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THE PLURALISTIC FOUNDATIONS OF THE RELIGION CLAUSES

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Contemporary Supreme Court interpretations suggest that the religion clauses are primarily rooted in the value of equality. The United States Supreme Court has argued that in the absence of discrimination against religion (or the presence of other constitutional values), there is no violation of the Free Exercise Clause when a statute inadvertently burdens religion. Similarly, equality values have played a strong role in the Court's Establishment Clause jurisprudence. Many distinguished commentators have pointed to the equality focus and have argued that it gives insufficient attention to the value of religious liberty. Professor Shiffrin argues that these commentators are right in contending that an equality emphasis misses much of importance in religion clause jurisprudence, but their emphasis on liberty or equal liberty is too narrow. Instead, he suggests an understanding of the proper place of equality in religion clause jurisprudence requires an appreciation of a wider range of values.

Professor Shiffrin recognizes that the equality value is important, but shows that many deviations from religious equality are deeply embedded in the framework of government operations. For example, it will not work to maintain that our Constitution regards religion and nonreligion as equal. Indeed, the religion clauses are best interpreted to protect religion not just because of values such as autonomy, equality, community, and religious peace, but because religion is regarded as valuable. This, he suggests, is a regrettable interpretation. It obviously is a bitter pill for religious skeptics to swallow, and it should even be a source of regret for most religious believers. Nevertheless, this interpretation is the best reading of our evolving Constitution. The foundational view that religion is valuable, however, does not flirt with theocracy. Far from it. The Constitution forbids coercion and, with exceptions, the favoring of one religion over another. Even more important, the Constitution, with some exceptions, is best interpreted to curb government intervention that favors religion, not because religion is a constitutional

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stepchild, but because the seductions of governmental dependence are great and because government is not to be trusted.

In applying his analysis, Professor Shiffrin explores many examples, including (1) the ingestion of peyote; (2) animal sacrifice; (3) the government's use of religious symbols; (4) the government's support of monotheism, including the Pledge of Allegiance; (5) the teaching of evolution in the public schools; (6) the government's protection of conscientious objectors and those who refuse to work on the Sabbath; and (7) voucher programs together with government support for religion within the public schools. Given the pluralistic nature of the values underlying the religion clauses and the variety of contexts in which questions about the legal status of religion arise, he concludes that equality can best be seen as one important value among many in a rich and evolving tradition.

This tradition, he argues, is misunderstood by both the secular left and the religious right. The secular left does not understand the importance of religion in our constitutional tradition, and the religious right does not understand that government harms religion when it tries to help. Neither the secular left nor the religious right understand the complex dimensions of religious equality.

INTRODUCTION

Contemporary Supreme Court interpretations suggest that the religion clauses are primarily rooted in the value of equality.[1] For example, in interpreting the Free Exercise Clause, the United States Supreme Court has argued that in the absence of *discrimination* against religion or in the presence of *other* constitutional values, it is not unconstitutional for a statute to inadvertently burden religion.[2] Similarly, equality values have played a strong role in the Court's Es-

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[1] Without approving of the trend, Daniel Conkle has suggested that "formal neutrality has become the dominant theme under both the Free Exercise and Establishment Clauses." Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 10 (2000); *see also* Thomas C. Berg, *Slouching Toward Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L.J. 433, 446–47 (1995) (finding Court decisions "increasingly driven by the equal treatment theme"). The emphasis on equality is closely associated with, but not identical to, a "neutrality" approach to the Establishment Clause. *See* Zelman v. Harris, 536 U.S. 639, 676 (2002) (Thomas, J., concurring); Mitchell v. Helms, 530 U.S. 793, 809–10 (2000) (Thomas, J., plurality opinion). Formal—not substantive—equality is the principal (but not exclusive) value of that approach. Neutrality is a doctrinal approach, then; formal equality is the primary value that it serves.

[2] Employment Div. v. Smith, 494 U.S. 872, 878 (1990). For criticism of *Smith*, see Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 670–80 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1152–53 (1990) [hereinafter McConnell, *Revisionism*]. In support of *Smith*, see William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308–28 (1991). For debate about the original meaning of the Free Exercise Clause, compare Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 936–46 (1992), arguing that history does not support religious exemptions from laws, with Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415, 1513–17 (1990) [hereinafter McConnell, *Origins*], arguing that history supports religious exemptions from laws, and that these exemptions were "consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God." For John Locke's position, see JOHN LOCKE, A LETTER CONCERNING TOLERATION 41–42 (James Tully ed., 1983). For analysis of the effect of incorporating the clause into the Fourteenth Amendment, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1149–56 (1994).

tablishment Clause jurisprudence.[3] Many distinguished commentators have argued that the Court's focus on equality results in insufficient attention paid to the value of religious liberty.[4] In my view, these commentators are right in contending that an equality emphasis misses much of importance in religion clause jurisprudence. But their emphasis on liberty or equal liberty[5] is too narrow. Instead, I will suggest that understanding the proper place of equality in religion clause jurisprudence requires appreciation of a broader range of values with regard to both religion clauses,[6] and a recognition that this appreciation is itself independently important. Discussing the failure to recognize the full range of values underlying the Free Exercise Clause is, of course, a necessary theoretical prelude to discussing the Establishment Clause. But it is more than that. The failure to appreciate the breadth of values underlying the Free Exercise Clause is also pragmatically important because a better understanding of the Clause could persuade citizens, jurists, and legislators that greater protection is appropriate in particular circumstances.[7] With respect to

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3 *See* Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 189 (2001) (referring to the Court's "shift in emphasis from separation to equality"); Berg, *supra* note 1, at 446–47; Conkle, *supra* note 1, at 6–8; Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 694–700 (2002).

4 *See, e.g.*, Berg, *supra* note 3, at 198 (remarking that there is currently no Supreme Court Justice consistently willing to depart from an equal treatment approach in favor of embracing the value of liberty or substantive neutrality); Choper, *supra* note 2, at 680–84 (discussing the limited scope of protection offered by the Free Exercise Clause after *Smith*); McConnell, *Revisionism*, *supra* note 2, at 1137–39 (supporting religious exemptions under the Free Exercise Clause).

5 Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 567–70 (1991) (arguing that the religion clauses protect the values of liberty and equality or a regime of equal religious liberty).

6 Some scholars have somewhat broader views of the scope of religion clause values than most others in the field. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1154–1301 (2d. ed. 1988); Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 112–17 (1992) [hereinafter Hall, *Civic Virtue*]; Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMPLE L. REV. 1, 77–89 (1992) [hereinafter Hall, *Equality*]. Daniel Conkle, also displays eclectic views of Establishment Clause values. *See generally* DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES (2003) [hereinafter CONKLE, CONSTITUTIONAL LAW] (maintaining that multiple values underlie the religion clauses); Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988) [hereinafter Conkle, *General Theory*] (same). Although I share their commitment to a broad understanding of the values underlying the religion clauses, I part company with them concerning the character of the religion clause values, the way in which they should be defended, and the manner in which they should be applied. Moreover, none of these commentators focus upon the complicated ways in which equality relates to the religion clauses.

7 For example, many courts and legislatures have not yet addressed whether states should interpret their own constitutions to provide more generous protection for religious liberty than is afforded by the United States Supreme Court. *See, e.g.*, Catholic Charities of Sacramento v. Superior Court, 85 P.3d 67, 89–91 (2004) (leaving open the scope of religious liberties covered by the Free Exercise Clause of the California Constitution).

the Establishment Clause, the failure to recognize the full range of relevant values creates an additional difficulty. By failing to appreciate the value of protecting religion from a government trying to be "helpful," the Supreme Court[8] and distinguished scholars[9] make some Establishment Clause problems appear easier than they are. In reality, too many values interact in too many complicated ways to hope or expect that the clauses could be reduced to a single value such as "equality" or even to a small set of determining values. Failure to appreciate this complexity leads the Court and important commentators to miss the extent to which the values underlying the Establishment Clause conflict with each other.

In exploring these arguments, Part I argues that the Free Exercise clause is supported by seven values: (1) it protects liberty and autonomy;[10] (2) it avoids the cruelty of either forcing an individual to do what he or she is conscientiously obliged not to do or penalizing her for responding to an obligation of conscience;[11] (3) it preserves respect for law and minimizes violence triggered by religious conflict;[12] (4) it promotes equality and combats religious discrimination;[13] (5) it protects associational values;[14] (6) it promotes political community;[15] and (7) it protects the personal and social importance of religion.[16]

Part II argues that the Establishment Clause is also supported by seven values: (1) it protects liberty and autonomy, including preventing the government from forcing taxpayers to support religious ideologies to which they are opposed;[17] (2) it stands for equal citizenship without regard to religion;[18] (3) it protects against the destabilizing influence of having the polity divided along religious lines;[19] (4) it promotes political community;[20] (5) it protects the autonomy of the state to protect the public interest;[21] (6) it protects churches from the

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8 *See, e.g.*, Berg, *supra* note 3, at 232–47 (describing cases involving government assistance to religious institutions and activities that do not consider the risks of government involvement).

9 *See, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 174–78 (1995) (upholding financial aid to religious institutions in some circumstances without considering the issue); *accord* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 70–71 (1997); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) [hereinafter McConnell, *Coercion*].

10 *See infra* Part I.D.1.

11 *See infra* Part I.D.2.

12 *See infra* Part I.D.3.

13 *See infra* Part I.D.4.

14 *See infra* Part I.D.5.

15 *See infra* Part I.D.6.

16 *See infra* Part I.D.7.

17 *See infra* Part II.B.1.

18 *See infra* Part II.B.2.

19 *See infra* Part II.B.3.

20 *See infra* Part II.B.4.

21 *See infra* Part II.B.5.

corrupting influences of the state;[22] and (7) it promotes religion in the private sphere.[23]

In assessing the appropriate relationship between religion and the state, it is vital to draw upon an eclectic mix of resources. No single source of interpretation should be regarded as dispositive. Although original intent is entitled to some weight in some circumstances, it should not be primary for many reasons. Among other things, it is not clear that the original intent of the Framers was for us to follow their intent.[24] Even if it were, the Framers themselves did not agree upon the appropriate relationship between religion and government.[25] And furthermore, even if they had agreed, it is not clear that a legal theory requiring us to be bound in the twenty-first century by the will of a group of eighteenth century white male agrarian slaveholders would have a lot to recommend it.[26] Moreover, our whole history of constitutional interpretation testifies that precedent is a more important source of interpretation than original intent.[27]

Although precedent may be more important than original intent, it also cannot be of primary importance for our inquiry. Our point here is not to follow the law as if we were lower court judges, but rather to extend our understanding of religion clause theory and jurisprudence. Therefore, precedent should not be our primary guide. In determining the value of the religion clauses, we should consult the best thinking on the subject and that should include the writing of Framers, jurists, political theorists and commentators. Moreover, we should be influenced by how relationships between church and state have worked in practice, and there the testimony of historians, political scientists, sociologists, and theologians is indispensable. In short, my view is that in interpreting the religion clauses, we should act like constitutional scavengers,[28] appropriating the best theory and the best

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22 *See infra* Part II.B.6.

23 *See infra* Part II.B.7.

24 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902–48 (1985).

25 CONKLE, CONSTITUTIONAL LAW, *supra* note 6, at 19. For an excellent account of the different paths taken in analyzing the religion clauses and their historical antecedents, see JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 7–36 (2000).

26 *See* Gordon S. Wood, *Slaves in the Family*, N.Y. TIMES BOOK REV., DEC. 14, 2003, at 10 ("Seeing Washington and Jefferson as slaveholders, men who bought, sold, and flogged slaves, has to change our conception of them. They don't belong to us today; they belong to the 18th century, to that coarse and brutal world that is so remote from our own.") Although we might wish that the eighteenth century's coarseness and brutality was more remote from our own, Wood's point about contextualizing the founders is on the mark.

27 *Cf.* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 97 (1993) (suggesting that an originalist view would yield an "understanding of the Constitution [that is] dramatically different from the understanding that prevails today").

28 Gregory S. Alexander, *Interpreting Legal Constructivism*, 71 CORNELL L. REV. 249, 249 (1985) (book review) ("In the deconstructed legal culture lawyers must be intellectual scav-

descriptions of how the world actually works in order to arrive at our conclusions. On the other hand, the task is not to produce a "perfect" Constitution,[29] divorced from the values, experiences, and traditions of our nation. Our scavenging must produce insights that comfortably fit within our evolving traditions.[30]

In the end, there is no substitute for practical reason. Indeed, when it comes to applying the religion clauses to concrete cases, I press for the view that there is no pat formula, no single determining principle that resolves them. What is true with the speech clause[31] holds with both the religion clauses: balancing or prudential judgment concerning multiple values in a variety of concrete contexts is unavoidable. By this I do not mean to suggest that ad hoc balancing is always appropriate. The mix of values frequently requires the formulation of rules and standards to apply in specific factual contexts.[32] That these rules or tests may differ need not signal confusion. They may simply respect relevant differences. To have a sense of this, however, it is necessary to consider a range of situations. Accordingly, I discuss many examples, including (1) peyote ingestion; (2) animal sacrifice; (3) the government's use of religious symbols; (4) government involvement with monotheism, including the Pledge of Allegiance; (5) the teaching of evolution in the public schools; (6) government protection of conscientious objectors and those who refuse to work on the Sabbath; and (7) government support for religion within and without the public schools.

In both Parts of this Article, I argue that the religion clauses cannot be explained by reference to equality. The equality value is important, but I try to show that many deviations from equality are deeply embedded in the framework of government operations. For example, it will not work to maintain that our Constitution regards

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engers, raiding other disciplines for helpful vocabularies, using as much of the discourse as seems helpful, and discarding the rest.").

29 Although I do not share Henry Monaghan's views of the Due Process Clause, I think it unassailable that there can be a gap between what is constitutional and what is just. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 354–60 (1981).

30 RONALD DWORKIN, LAW'S EMPIRE 176–275 (1986).

31 STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 9–45 (1990) (defending a balancing methodology); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 942–63 (1978) (same).

32 Thomas Berg recognizes that different tests may be appropriate in different Establishment Clause contexts. Thomas C. Berg, *Religious Clause Anti-Theories*, 72 NOTRE DAME L. Rev. 693, 696–97 (1997). I agree with this methodological perspective, but part company with Professor Berg regarding the scope of values underlying the Establishment Clause.

For a sampling of the literature exploring when to use rules and when to use standards, see Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. Rev. 285; Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985); Shiffrin, *supra* note 31; Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. Rev. 22 (1992).

religion and nonreligion as equal. Indeed, the religion clauses are best interpreted to protect religion not just because of values such as autonomy, equality, and religious peace, but because religion itself is regarded as valuable. In my view, this is a regrettable interpretation.[33] It is obviously a bitter pill for religious skeptics to swallow, and it should be a source of regret for most religious believers. As I will argue, however, it appears to be the best reading of our evolving Constitution.[34] Nonetheless, the foundational view that religion is valuable does not flirt with theocracy. Far from it. The Constitution forbids coercion and the favoring of one religion over another (except when it doesn't—more on that later). Even more importantly, again with some exceptions, the Constitution is best interpreted to curb government intervention in favor of religion, not because religion is a constitutional stepchild, but because the seductions of governmental dependence are great and because government is not to be trusted.

The upshot of these values and principles is that other deviations from religious equality are sometimes permitted. In part, these deviations are influenced by a strong religious presence in American culture, the pluralistic character of American religions, and the plethora of conflicting religious beliefs. For better or for worse, the urge on the part of religious culture to find some expression in governmental activities leads to government engaging in monotheistic prayers. Because of the pluralistic and conflicting character of religious beliefs, government often participates in practices inconsistent with or forbidden by many established religions. On a similar note, because religions impact government interests in diverse ways, government can sometimes remove obstacles impeding the practice of some religions, but not others.

Deviations from religious equality are not always fatal, nor should they be. Similarly, compliance with religious equality should not always pass muster under the religion clauses. The kind of formal equality denying liberty to those religiously burdened by a law not aimed at religions is unworthy of respect. Financial aid afforded to religious and nonreligious schools alike also raises serious Establishment Clause issues despite compliance with equality. The same applies to proposals to permit equal access to classrooms for religious and secular leaders. For those who revel in simplicity these conclusions will be unsettling. But there is a deeper concern. Complying

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33 As will be clear, this is not because I personally regard a religious perspective to be false or without value (though many such perspectives are); it is because I believe that governmental attempts to aid religion too often harm religion.

34 In so arguing, I support the view that interpretation of the Constitution involves mixed normative and descriptive judgments.

with equality is seen by many as a proxy for fairness. If equality is not the central meaning of the religion clauses, there is the suspicion that everyone is not being treated fairly. That suspicion is warranted, and improvements can be made, particularly in the direction of substantive equality. I will argue, however, that religious equality cannot possibly be achieved in a diverse society. Given the pluralistic character of the values underlying the religion clauses and the variety of contexts in which questions about the legal status of religion arise, equality is best seen as one important value in a rich and evolving tradition.

Both the secular left and religious right misunderstand this textured religious tradition. The secular left does not understand the importance of religion in our constitutional tradition. The religious right does not understand that government harms religion when it tries to help. Neither understands the complex dimensions of religious equality.

I
THE FREE EXERCISE CLAUSE

The Massachusetts Bay Colony tried to protect its inhabitants from blasphemers and heretics by banishing them from the colony. If those banished returned, the authorities engaged in whippings, cut off ears, bored tongues with hot irons, and resorted to executions.[35] For minority religions, freedom of religion was the right to keep quiet, the right to be punished, or the right to leave Massachusetts.[36] To stay in Massachusetts was to accept and live by the terms of the Puritan deal.[37]

The fighting legal issue regarding free exercise today is not whether persons are free to hold opinions different from the majority

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35 TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 48–49 (1998); JAMES A. MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY 70 (2003).

36 Hall, *Equality*, *supra* note 6, at 29–30. The colonists thought they were following the will of God. For the more influential argument that most religious persecutors misunderstood the will of God, see LOCKE, *supra* note 2, at 23–26. Augustine, on the other hand, thought that religious persecution was theologically justified. *See* HANS KÜNG, GREAT CHRISTIAN THINKERS 81–82 (1994). And Locke's toleration did not extend to Catholics, Muslims, and atheists. Locke, *supra* note 2, at 50–51. For a critical evaluation of Locke's argument for religious liberty, see Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2255–69 (1997). On the Christian theory of persecution, see generally PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST 14–45 (2003) (defining "heresy" and addressing how the church treated heretics from the earliest times of Christianity until the end of the Protestant Reformation); John T. Noonan, Jr., *Development in Moral Doctrine*, *in* CHANGE IN OFFICIAL CATHOLIC MORAL TEACHINGS 287, 292 (Charles E. Curran ed., 2003) (describing how both the church and state "regularly and unanimously denied the religious liberty of heretics" for more than 1,200 years).

37 HALL, *supra* note 35, at 48–64.

or to express those opinions in the public square, but the extent to which government can restrict religious action.[38] There is general agreement that government may not single out religious action for special adverse treatment.[39] The question is whether a general law that incidentally burdens religious conduct is vulnerable on the ground that it violates the free exercise of religion. Let me begin by giving two examples, analyzing them under the Supreme Court's current approach, under traditional secular liberal approaches, and under communitarian approaches,[40] before developing my own views.

(1) The state of Oregon outlaws ingesting peyote regardless of the motivation for doing so. Four persons ingest peyote: the first as part of a religious ceremony of a Native American church; the second as an integral part of an artistic life, believing peyote ingestion is an important part of the creative process; the third as an integral part of a hedonistic life style; and the fourth who tries the drug out of curiosity.

(2) Three persons violate a law against the torture of animals: the first as part of a required religious ceremony; the second as a piece of performance art; the third as a part of a sadistic life style.

A. The Court's Approach

Although the matter is not entirely free of difficulty, it seems that the Court as currently constituted would deny the religious claims in each of the examples mentioned above. Justice Scalia, writing for the Court in *Employment Division v. Smith*,[41] argued that a law outlawing the ingestion of peyote could constitutionally be applied to a participant in a religious ceremony of the Native American Church.[42] Justice Scalia did not suggest that the importance of the state interest in the individual case outweighed a cognizable religious claim. Instead, he maintained that there was no cognizable religious interest in the first

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38 Sometimes government can interfere with religion without interfering with religious action, for example, by desecrating sacred places. *See generally* David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 824–31 (1991) (criticizing the view that "government action desecrating a site would present no cognizable effect, but government action denying access to the site would, because the religious harm would arise . . . from the inability of Indians to perform ceremonies there").

39 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

40 As will become clear, some communitarian approaches are secular and some are not.

41 494 U.S. 872 (1990).

42 The *Smith* case actually dealt with state denial of unemployment compensation benefits to individuals who had been fired from their jobs at a private drug rehabilitation center for ingesting peyote as a part of a Native American religious service. *See id.* at 874. The Court had to determine whether the law prohibiting peyote ingestion could constitutionally have been applied to the drug use at the religious ceremony to decide whether the applicants were appropriately denied their unemployment benefits. *See id.* at 876.

place.[43] Any other conclusion, he suggested, would lead to a "system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[44] Ironically, under existing law, the artistic claimant in both examples would have a cognizable speech claim[45] (even though it would undoubtedly be unsuccessful). It seems that the First Amendment is somewhat more solicitous of speech than it is of religion.[46] I believe one would have to rise very early in the morning to justify this differential treatment, and the Court has been sleeping on the subject for some time. In any event, the Court's bottom line would ultimately be the same for all claimants in both examples. One way or another, their claims would be denied; equal protection under the law is not always sweet.

B. Liberal Theory

Equality of application can be achieved in a different way, however. Followers of Immanuel Kant believe that rights may not be infringed unless the exercise of those rights interferes with the rights of others.[47] So, with respect to the peyote example, a Kantian might argue that the autonomous choice of the individuals involved should be

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43 *See id.* at 878–80. Justice Scalia maintained that a successful religious claim could be maintained only if religion were singled out for special treatment, *see id.* at 877–78, or when the religious interest was accompanied by another constitutional interest, giving rise to a "hybrid" claim. *See id.* at 881–82. On the fate of *Smith* in the lower courts, see Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1060–73 (2000) (describing "distortions and inconsistencies" in the lower courts' post-*Smith* jurisprudence).

44 *Smith*, 494 U.S. at 890. The sweep of the opinion led Michael McConnell to say that the decision was "undoubtedly the most important development in the law of religious freedom in decades." McConnell, *Revisionism, supra* note 2, at 1111.

45 Laws of general application with an incidental impact on freedom of speech are required to meet what has in practice been a relatively undemanding test. The leading case is *United States v. O'Brien*, 391 U.S. 367, 376 (1968) which upheld a law prohibiting draft card burning, stating that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *See also* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (ban on public nudity upheld as applied to nude dancing); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (ban on sleeping in the park upheld as applied to demonstration against government policy regarding the homeless).

46 On the irony of this, see KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 22–24 (1995).

47 IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 35, 43–44 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797) (explaining that one individual does an injustice to another when he interferes with the freedom of another); JOHN RAWLS, A THEORY OF JUSTICE 204 (1971) ("[A] basic liberty covered by the first principle can be limited only for the sake of liberty itself, that is, only to insure that the same liberty or a different basic liberty is properly protected and to adjust the one system of liberties in the best way."); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 199–200 (1977) (maintaining that except in extreme cases, rights may be limited only when another right is abridged).

respected because ingesting peyote does not interfere with the rights of another.

The animal torture example is particularly difficult for the Kantian. The Kantian traditionally believes that humans are distinguished from animals in their ability to reason and make autonomous choices.[48] According to this reasoning, animals have no rights because they are not moral creatures.[49] Applying the principle that individuals' autonomous choices should be protected unless they interfere with the freedom of others, a principled Kantian would have to conclude that in a just state, the believer, the artist, and the sadist should each be permitted to torture animals.

Nietzsche once suggested that to have a system is to lack integrity,[50] and I would hope that followers of Kant would lack integrity in this circumstance and not follow their principles.[51] Indeed, Kant himself did not always adhere to his principles. He himself argued that animal cruelty could be proscribed because it brutalized human beings,[52] but this prefers one lifestyle over another and sidesteps the notion that imposing suffering on animals is an independent wrong, regardless of how it impacts human beings.[53]

What the approaches of Scalia and Kant have in common is that neither of them treat religious liberty differently from other forms of liberty. Religion is not deemed to be special, and religious liberty would have no special privilege in these examples.[54]

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48 *See generally* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Beck trans., Bobbs-Merrill Co. 1959) (1785) (explaining concepts of reason, autonomy, and human dignity).

49 *See* IMMANUEL KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE 105 (James Ellington trans., Bobbs-Merrill Co. 1964) (1888).

50 FRIEDRICH NIETZSCHE, THE TWILIGHT OF THE IDOLS OR, HOW ONE PHILOSOPHIZES WITH A HAMMER, *reprinted in* THE PORTABLE NIETZSCHE 463, 470 (Walter Kaufmann ed., trans., 1968).

51 Even better, the Kantian tradition has evolved in ways that have modified its narrow understanding of what makes human beings important or how much the differences between human beings and animals matter. For example, Tom Regan's articulate defense of animal rights rejects the Kantian understanding of autonomy. TOM REGAN, THE CASE FOR ANIMAL RIGHTS 84 (1983); *see also* CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY 152–53 (Onora O'Neill ed., 1996) (focusing on the extent to which an animal nature is a part of human nature worth valuing and that both animals and humans have a "way of being" someone that they share). I do not know if Korsgaard is suggesting that we would have to share a way of being with animals to justify obligation. She does make it clear that one may owe obligations to creatures whether or not they are moral agents.

52 KANT, *supra* note 49, at 106 (suggesting that cruelty to animals violates a duty to oneself because it reduces compassion which, in turn, will harm relations with other human beings).

53 *See* Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1138–40 (1983).

54 *Cf.* RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM 69 (John M. Farrell trans., 1994) ("A person's religious conviction is worthy of protection because it is identity-determining, and not because it is religious.").

C. Communitarian Theory

The approach to religious freedom taken by communitarianism depends on the particular form of communitarian theory. In general, communitarians maintain that liberalism exalts individual liberty at the expense of democracy and self-government,[55] autonomy at the expense of civic virtue[56] or community, and rights at the expense of duties.[57] This cluster of ideas can lead to differing approaches regarding freedom of religion. Distinguishing between participatory communitarians, traditional communitarians, and substantive communitarians should help illustrate this point.

A participatory communitarian would place most emphasis on self-government[58] and the capacity of the polity to change. Rights, on this conception, would not be discarded but would flow from the idea of self-government and the conditions that make self-government possible.[59] On that analysis, it is easy to see how rights of freedom of speech and press would arise. It is, however, more difficult to ground a comprehensive right to freedom of religion.[60] It might be possible

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For the religious right, and some on the religious left, the worthiness of protection would in part depend upon its religious character. In this respect, Justice Scalia, a religious believer and a member of the right, is not a member of the religious right.

55 *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109–44 (1991) (discussing how the current focus on individual liberty makes it difficult to cultivate the "values and practices that sustain our republic" through the political process).

56 *See, e.g.*, ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 252, 257–59 (2d ed. 1984) (preferring an Aristotelian emphasis on virtues over a liberal emphasis on rational rules); *see also* GERTRUDE HIMMELFARB, THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES 9, 246–57 (1995) (contrasting differences in content and observance of virtues in Victorian and contemporary times, and lauding Victorian ethos requiring respect for others). Many of those associated with communitarianism, including McIntyre, Michael Sandel, and Michael Walzer, do not accept the label for one reason or another. DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS 1 (Oxford 1993). For the argument that liberalism also seeks to support virtues appropriate for the maintenance of a regime of personal freedom, see PETER BERKOWITZ, VIRTUE AND THE MAKING OF MODERN LIBERALISM 189–92 (1999).

57 GLENDON, *supra* note 55, at 76–108.

58 Self government does not refer to individual autonomy, but to democratic rule of the polity. At best, of course, it is a metaphor. It would be hard to know who the "self" is that rules in our "democratic" society. On the difficulties associated with the metaphor, see Steven H. Shiffrin, *Liberal Theory and the "Loyal Opposition" in Democratic Justice*, 11 GOOD SOCIETY 78, 79 (2002) (book review).

59 MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 321–28 (1996) (arguing that cultivating religion and morality is necessary for appropriate discourse in a self-governing society). *Compare* SUNSTEIN, *supra* note 27, at 347–54 (arguing for a liberal republican defense of rights), *with* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (providing a liberal pluralist defense of rights grounded in processes of representative democracy). For criticism of Sunstein and Ely, see James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 233–39, 241–42 (1993).

60 On the problem, see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 180–92 (1989).

to squeeze freedom of religion into the idea of self-government by positing that religion is necessary for the virtues that support self-government. Even accepting this assumption, however, it is not clear why self-governing citizens could not be permitted to distinguish between and discriminate against those religions that support civic virtues and those that, for example, support intolerance toward others. Of course, the notion of self-government assumes equality of persons, but on the communitarian understanding, equality of persons does not necessitate equal respect for the choices people make.[61] The participatory branch of communitarianism, therefore, could support some religions, but not others.

On the other hand, Cass Sunstein suggests that religious peace is a precondition for self-government, and that religious persecution or, more narrowly, government favoritism of religion, endangers religious peace.[62] The necessity-for-religious-peace arguments do not afford a sturdy basis for protecting religions that are unable or unwilling to put up a significant fight,[63] nor do they address other circumstances where violence or instability are unlikely. Moreover, a virtuous citizenry and a citizenry not embroiled in overt hostilities have value above and beyond their support of political deliberation. Finally, the civic virtue and religious peace values do not exhaust the range of values supporting religious freedom.

Perhaps traditional communitarianism can provide a stronger footing.[64] Traditional communitarians conceive of traditions as the foundation of the national community. One could certainly argue that a substantial part of the American tradition is to protect religion. On the other hand, communitarianism—even on that understanding—justified anti-catholicism,[65] anti-semitism,[66] and discrimination against groups such as the Mormons and the Jehovah's Witnesses[67]

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61 *See* MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 59, 64–65 (1997); Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1794 (1994) (book review).

62 SUNSTEIN, *supra* note 27, at 133–41, 307.

63 JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 48–49 (1996).

64 For a description of traditional communitarianism, see IAN SHAPIRO, THE MORAL FOUNDATION OF POLITICS 171 (2003): "The communitarian outlook is distinctive, and distinctively at odds with the Enlightenment, in that its proponents see the good as collectively given, embedded in the evolving traditions and practices of political communities."

65 *See* WILL HERBERG, PROTESTANT—CATHOLIC—JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 231–34 (rev. ed. 1960); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 299–305 (2001).

66 STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1997) (describing the history of anti-semitism, with an emphasis on American culture).

67 On the Mormons, see Sarah Berringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI-KENT L.REV. 739 (2003); on the Jehovah's Wimesses, see Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State

throughout much of our history, and it is not clear why it would not justify discrimination against Muslims[68] and other minority religions in contemporary culture.[69] American ideals honor freedom of religion; American practice protects freedom of religion—except when it doesn't. In interpreting American culture, do we look to the practice or to the theory?[70] If we look to the practice, we ratify violations of religious liberty. If we look to the theoretical ideals, we risk abandoning the rich complications of the community for the abstract liberalism that communitarianism purports to denounce.

Substantive communitarians value religion as a source of moral and civic virtue, as a way of life, and a way of truth.[71] Standing alone, however, these beliefs are not necessarily tied to freedom of religion.[72] After all, the leaders of the Massachusetts Bay Colony were substantive communitarians, yet they banished heretics and blasphemers.[73] Contemporary substantive communitarians presumably would make distinctions of quite a different sort than those of John Winthrop, Cotton Mather, and their fellow colonists. Substantive communitarians value religion as an associational activity and incline against individualism.[74] If the person who ingested peyote for

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Board of Education v. Barnette: *The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 433–75 (Michael C. Dorf ed., 2004).

68 ROWAN WILLIAMS, WRITING IN THE DUST: AFTER SEPTEMBER 11, at 67–68 (2002); R. LAURENCE MOORE, TOUCHDOWN JESUS: THE MIXING OF SACRED AND SECULAR IN AMERICAN CULTURE 111–12 (2003).

69 *See* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 227 (1990) ("[T]he problem of the exclusion of historically marginalized groups is endemic to the communitarian project.")

70 SHAPIRO, *supra* note 64, at 175 ("In most, if not all, communities, there is considerable disagreement about how the collectively given norms and practices that have been inherited should be interpreted and what they require in practice.").

71 "'[R]eligion was especially important to the development of a republican culture,' with religious (including especially Christian) values and insights playing prominent and substantial roles . . . ." Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & RELIGION 337, 356 (1995–96) (quoting Richard Vetterli & Gary C. Bryner, *Religion, Public Virtue and the Founding of the American Republic*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 92 (1988)); *see also* Lash, *supra* note 2, at 1118–22 (discussing the view that commitment to a republican culture involved the promotion of Christian values). As will become clear, stress on cultural values does not exhaust the richness of the case for religious freedom.

72 On the perils of religious communitarianism, see FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 122–25 (1995) ("Religious communitarian discourse is not a viable alternative to secular individualism."); Hall, *Civic Virtue*, *supra* note 6, at 119 ("Historically, republican principles were a poor ally for religious liberty. They could as easily justify jailing a dissenting preacher who threatened republican solidarity as giving him free room to propagate minority religious tenets, and they were the joists over which the platform of religious establishment was most frequently laid.").

73 *See supra* text accompanying notes 35–37.

74 *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 17 (1993) (defining religion in terms of group worship).

religious reasons was associated with an institutional religion with a history and an association of believers, the substantive communitarian would be sympathetic. The substantive communitarian might have less sympathy for the sincere, but individualistic, New Age pacifist believer who did not belong to a religious group. Nonetheless, the substantive communitarian might be consoled by the fact that the pacifist was following a duty to God rather than making an autonomous choice.

D. Free Exercise Values

In my view, the approaches taken by the Court, the Kantian liberal tradition, or communitarians are not sufficiently sensitive to the special claims of religious believers. The foundations of religious freedom are more complicated than those approaches assume. Indeed, the Free Exercise Clause is supported by seven different values.

1. *Liberty and Autonomy*

Both the religious claimants and the nonreligious claimants in our examples maintain that they have made an autonomous choice to lead their lives in a particular way, and the state is burdening an important aspect of their liberty. Unquestionably, autonomy is a significant value, and it is part of the reason that the free exercise of religion is supportable. Moreover, it should be clear that the *free* exercise of religion implies the liberty right not to practice religion.[75] As we have seen, however, an emphasis on liberty or autonomy does not distinguish religious claims from artistic or hedonistic claims. If liberty or autonomy is the crucial value, one can make a case for all of the claimants, including those in the peyote and animal torture examples.

2. *Obligation and State Cruelty*

Unlike the other claimants, the religious claimant maintains that her conduct is dictated by a moral obligation, not pursued according to a choice or preference.[76] To be sure, the religious claimant has

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75 *Cf.* Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961) (holding unconstitutional a state requirement that a notary swear a belief in God because it invaded freedom of belief and religion).

76 For these purposes, it should not matter whether the obligation comes from a belief in God, traditional or otherwise. It is enough that the obligation is morally based. *See* Welsh v. United States, 398 U.S. 333, 343–44 (1970) (interpreting the University Military Training and Service Act to protect conscientious objection on "deeply held" moral grounds without belief in God); United States v. Seeger, 380 U.S. 163, 176 (1965) (interpreting the University Military Training and Service Act to protect conscientious objection not based upon belief in a traditional God); AMY GUTMANN, IDENTITY IN DEMOCRACY 168–78 (2003) (discussing the extent to which ethical obligations should be accommodated whether or not based on religious premises); *see also* William Herbrechtsmeier, *Buddhism and the Definition of Religion: One More Time*, 32 J. FOR THE SCI. STUDY OF RELIGION 1, 15–17

made the choice to accept the obligation (or may believe that he or she has been given the grace to accept the obligation).[77] Nonetheless, it seems particularly cruel[78] for the state to force individuals to do what they are obliged not to do or to penalize them for responding to obligations.[79] Moreover, to make no distinction between religious obligations (or obligations of conscience) and lifestyle preferences seems to conflate too much.[80] Whether or not the religious claimant

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(1993) (arguing that theistic definitions of religion are too narrow and cannot account for religions such as Buddhism).

77 Resisting the free exercise claim of obligation, Professor Marshall argues that religion might be best understood as a "product of man's freedom rather than his external obligation." Marshall, *supra* note 2, at 327. He suggests that his conception of religion is more consistent with the commitment to freedom in the First Amendment than is Judge McConnell's argument that "religion should be treated as the product of an externally imposed obligation." *Id.* Marshall's conception of religion is underdeveloped, and seems to be beside the point. Certainly it is not inconsistent with the Constitution to interpret free exercise of religion to embrace individuals' duties to follow obligations when they are freely accepted. To the extent obligations are deemed to be imposed without the possibility of rejection (presumably under some deterministic reasoning), the case for protection seems even stronger. On the importance of obligation to religion and the role of subjectivity in accepting the obligation, see KARL RAHNER, FOUNDATIONS OF CHRISTIAN FAITH: AN INTRODUCTION TO THE IDEA OF CHRISTIANITY 343–44 (William V. Dych trans., 1978).

78 One might argue that the problem is not cruelty, but rather that the state has no jurisdiction to interfere in the religious sphere. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 173 (1992) (discussing the "view that the relations between God and Man are outside the authority of the state"). To be sure, the Framers had a widespread view that some things belonged to God and others to the state, *see* Hall, *Equality*, *supra* note 6, at 32–36, but it is not clear from the historical evidence that exemptions of this type fell on God's side of the ledger. *See* Hamburger, *supra* note 2, at 932–33, 936–46. Treating state interference with religion as "jurisdictional overreaching" is difficult to reconcile with a balancing approach that seems inevitable once exemptions are recognized. *See infra* notes 104–117 and accompanying text. Moreover, the "jurisdiction" view of free exercise would afford no protection for those who acted on the basis of moral conscience, not based on belief in God. *Cf. Seeger*, 380 U.S. at 176 (construing "religious training and belief" to include "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God"). One might still argue that the jurisdiction view is a part of the values underlying the Free Exercise Clause. Given the originalist pedigree for the argument, this argument makes some sense. *See* Hall, *Equality*, *supra* note 6, at 32–33 (discussing conceptions of religious liberty from the colonial period to the adoption of the First Amendment). Moreover, the case for a partial religious foundation for the religion clauses is not confined to originalism. *See infra* notes 234–86 and accompanying text.

79 *See* McConnell, *supra* note 78, at 173 ("The Free Exercise Clause does not protect autonomy; it protects obligation."); Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 993 (1986) (contending that requiring conduct that is at odds with religious duty is more serious than overriding speech preferences). As Professor McConnell observed elsewhere, an analogy to discrimination against the handicapped appropriately illustrates the importance of accommodating religious duty. Failing to accommodate the handicapped treats them as if they are the same when they are differently situated than other people. By contrast, racial discrimination ordinarily treats people who are the same as if they are different. *See* McConnell, *Revisionism*, *supra* note 2, at 1140.

80 Joshua Cohen, pointing to the special nature of believers' moral and religious obligations, argues that deliberative democrats should support religious liberty because re-

should be punished for ingesting peyote, that claimant has a stronger case than the artist who simply prefers, however strongly, to engage in an artistic project. The point here is not that religion is more important. The religion may be completely wrong. The point is the existential difference in the choice facing the claimants. Nor should it be decisive whether the religious consequences facing a religious claimant for violating the obligation are deemed by the claimant to implicate eternal punishment, though that factor might be relevant to the degree of burden the law places upon an individual.[81] To force someone to do what he is obliged not to do is especially cruel, regardless of the consequences he fears.[82]

3. *Ineffectiveness, Respect for Law, and Mitigation of Violence Triggered by Religious Conflict*

Because the claim of the religious person flows from an obligation, a second reason supports special consideration for religious claims. As John Locke famously argued, persecuting people in an attempt to make them change beliefs might succeed in controlling external conduct, but it is unlikely to be effective in controlling beliefs.[83] To be sure, modern impositions upon religion are designed to control conduct, not belief. But the existence of a law does not eliminate the

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jecting it would deny the principles of equal citizenship undergirding deliberative democracy. *See* Joshua Cohen, *Democracy and Liberty*, *in* DELIBERATIVE DEMOCRACY 202–07 (Jon Elster ed., 1998). This claim accents the liberal character of liberal communitarianism: liberal communitarianism derives from rights theory what is owed to citizens for them to participate in a community, rather than focusing upon rights they have that flow from the nature of a community. Michael Sandel argues that the unencumbered self of individualism wrongly emphasizes choice and that it cannot explain freedom of religion. *See* SANDEL, *supra* note 59, at 64–66. He suggests that observers have no choice but to follow conscience, and that treating religion as a mere choice "may thus fail to respect persons bound by duties derived from sources other than themselves." *Id.* at 67. This characterization ignores the extent to which conscience can be cultivated or desensitized through voluntary action, and it further ignores what the Christian tradition would call sin, which in many cases involves succumbing to temptation despite conscience. *See also supra* note 77 (discussing the relationship between freedom and obligation).

81 For the claim that free exercise claims of this stripe should be limited to those claimants who fear extratemporal consequences, see Choper, *supra* note 2, at 679. For a vigorous critique, see Gary J. Simson, *Endangering Religious Liberty*, 84 CAL. L. REV. 441, 446–51 (1996) (arguing that limiting protection to those who face extratemporal consequences is underinclusive, ignoring religions and tenets that encourage compliance out of reverence and love of God and duty to others). *See also* Hall, *supra* note 6, at 32–36 (commenting on the "core theoretical argument that centered on the perversity of subjecting individuals to conflicting claims of sovereignty by God, on the one hand, and civil government on the other").

82 The existence of obligation need not necessarily be a prerequisite for a Free Exercise claim. *See infra* note 93.

83 LOCKE, *supra* note 2, at 27; *see also* JAMES MADISON, MEMORIAL AND REMONSTRANCE (1785), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 12 (Marvin Meyers ed., 1973) ("Religion both existed and flourished . . . in spite of every opposition from [laws].").

perception of an obligation. Attempted enforcement of laws against religious claimants might not even succeed in controlling external conduct. In fact, it can frequently promote disrespect for law.[84] For example, persons drafted to serve in the military despite religious objections will often refuse to serve. The military will not get another soldier, but the state will be forced to support another inmate whose crime consists of following his or her perception of God's will over that of the state. It would push this argument too far to suggest that the absence of religious exemptions generally presents a serious risk of violence, but the goal of religious peace is certainly a compelling reason to ground a constitutional opposition to more general forms of religious persecution.[85]

4. *Equality and Anti-discrimination*

As Christopher Eisgruber and Lawrence Sager have argued in detail, enhanced judicial scrutiny for religious claimants is appropriate because of the possibility of discrimination on the basis of religion.[86]

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84 *See* MADISON, *supra* note 83, at 15.

85 *See* LOCKE, *supra* note 2, at 33; MADISON, *supra* note 83, at 14; J. JUDD OWEN, RELIGION AND THE DEMISE OF LIBERAL RATIONALISM: THE FOUNDATIONAL CRISIS OF THE SEPARATION OF CHURCH AND STATE 168–70 (2001); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty v. Equality*, 1993 BYU L. Rev. 7, 17–18. For an argument that the goal of religious peace has moral dimensions stretching beyond pragmatism, see JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 56–78 (1960). For doubts about the distinctiveness and cogency of religious peace as a value, see Stephen D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 207–10 (1991).

86 Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994); *see also* Jesse H. Choper, *Religion and Race under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 491–93 (1994) (arguing that a history of hostility and hate toward religious beliefs and race provides a strong justification for strict scrutiny of government discrimination based upon either); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 307 (arguing that religion is perceived to be "subject historically to abuse and persecution and therefore 'inherently suspect' as a basis for governmental classification"); Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295, 299 (2000) (contending that at a minimum the free exercise norm is an anti-discrimination norm). For doubts that an anti-discrimination principle would have yielded substantial protection in the areas where judicial scrutiny has been the most effective in protecting religion, see Prabha Sipi Bhandari, Note, *The Failure of Equal Regard to Explain the* Sherbert *Quartet*, 72 N.Y.U. L. REV. 97 (1997). For a wide-ranging and sensitive exploration of the possibilities of the equality value regarding the religion clauses, see Hall, *Equality*, *supra* note 6 *passim*.

Eisgruber and Sager deny that the value of religion entitles it to constitutional protection. Eisgruber & Sager, *supra*, at 1248. Their argument in part turns on objections to the subjective character of balancing tests and views about the proper roles of judges and legislators. *Id.* at 1248–59. These familiar objections, however, would seem to apply to vast areas of constitutional adjudication—including freedom of speech—which they regard as a model instance of constitutional value. *Id.* at 1250–51. They also deny that the cruelty of burdening conscience makes religion special, arguing that it would be equally cruel to burden the conscience of the nonreligious, or to punish or deny benefits to the disabled

American colonists fled from and then imposed religious inequality.[87] The Constitution was designed to put an end to such discrimination.[88] In a sense, as Jack Rakove puts it, "the religion question occupied a position similar to that of the race question in mid-twentieth-century America."[89] Of course, adopting the Constitution did not usher in a nation of religious equality. Discrimination against Catholics, Jews, Jehovah's Witnesses, Mormons, Muslims, atheists, and agnostics, among others, stain our history.[90] Although much of this discrimination has been in civil society, the Court has played a role in reflecting the religious prejudices of American society.[91] Nonetheless, the Court is well prepared to stamp out clear cases of discrimination. Thus, when the City of Hialeah outlawed animal sacrifice as part of a religious ritual while permitting it in other circumstances, the Court unanimously struck the ordinance down.[92] Although the question of what counts as discrimination and the question whether discrimination is sometimes justified can sometimes be complicated, I know of no commentator and no Justice who denies that equality is an important free exercise value.

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for that which they cannot do. *Id.* at 1262–65. Although they are correct in this respect, they provide no ground for denying a measure of protection to religious believers, but instead show that those of nonreligious moral conscience and the disabled should also be protected. To be sure, the cruelty rationale does not show that religion is itself valuable, but it provides an additional basis for denying that equality is the exclusive rationale for free exercise protection.

Finally, Eisgruber and Sager argue that religion can be a force for good or evil. *Id.* at 1265–67. They suggest that believers who violate otherwise valid laws do not likely engage in actions that are for the good of the republic, and find government endorsement of one (religious) view about what is valuable in life to be "indefensibly partisan." *See id.* at 1265–66. Even assuming a nonpartisan government on this understanding was workable and desirable, *but see* SHIFFRIN, *supra* note 31, this, as I argue below, slides too fast over the question whether our Constitution can best be interpreted in this way. As I argue below, we might have a better Constitution if it did not regard religious views as superior to nonreligious views (among other things, religion would be better off), but we have a flawed Constitution.

87 *See supra* notes 35–37 and accompanying text.

88 *See also* MADISON, *supra* note 83, at 11 (speaking of the *"equal* title to the free exercise of Religion").

89 Jack N. Rakove, *Once More into the Breach: Reflections on Jefferson, Madison, and the Religion Problem, in* MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 233, 256 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

90 *See supra* notes 65–69 and accompanying text; *see also* R. LAURENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICA (1986) (surveying the treatment by historians of different religious groups in America).

91 *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 *passim* (2001).

92 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993).

5. *Associational Values*

Association is a significant value, independently supported by nonreligious aspects of the First Amendment, but it is also one of the values underlying free exercise.[93] The importance of association to freedom of speech is not often noted,[94] but it seems absolutely vital.[95] Suppose the government outlawed the telephone book. The telephone book seems crucial to interpersonal communication and association. Secular associations nurture friendships, beliefs, controversies, ways of life, identities, and often impact upon the wider social and political sphere. Religious associations do all these things as well. Finally, the freedom of religious association warrants greater protection than freedom of association generally not only because religious associations are more likely to be discriminated against, but also because, as I shall subsequently argue, religion has special constitutional value.

6. *Promotion of Political Community*

Free exercise promotes political community in many ways. First, equal liberty with its implications for preventing violence is a necessary prerequisite for the maintenance of a tenable political community. Nations divided by the prospect or the reality of religious persecution can hardly nurture a defensible political community.[96] Second, the pluralistic character of American religion allows for Madisonian checks and balances, thereby stabilizing the political community.[97] Third, protecting free exercise has symbolic implications that reach beyond its nonsymbolic functions. One of the defining characteristics of the United States is its commitment to religious lib-

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93 Suppose a law prohibits gender discrimination and does not provide an exemption for the selection of religious leaders such as priests or ministers. Suppose further that the particular religion bringing the claim does not argue that it is obliged to discriminate on the basis of gender, but chooses to follow tradition or does so in order to avoid schism. Presumably, applying the law to the selection of religious leaders would violate both freedom of association and free exercise. For powerful argumentation in support of equality and dissenting rights within private associations, see Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003) and Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001).

94 *But see* Seana Valentine Shiffrin, *What's Wrong with Compelled Association*, 99 Nw. U. L. REV. (forthcoming 2005).

95 Association issues arise in a variety of contexts that will not be discussed here, but the literature is large and growing. *See, e.g.*, FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998) (analyzing the issue of freedom of association from various perspectives); NANCY ROSENBLUM, MEMBERSHIP AND MORALS (1998) (arguing that associations need not reflect public values to warrant constitutional protection).

96 *Cf.* Conkle, *General Theory*, *supra* note 6, at 1166–69 (maintaining that religiously inclusive policies support political community).

97 McConnell, *Origins*, *supra* note 2, at 1515–16. *But see* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 204–07 (1991) (questioning the pluralism rationale).

erty. That the country has been at the forefront of offering such protection is a substantial part of the pride of being an American citizen.[98] There are grounds to question whether a commitment to rights is enough to bind together a strong political community,[99] but it seems inescapable that the commitment to religious liberty is an important ingredient in binding our political community together.[100] Finally, as will be discussed *infra*, one can argue that the protection and promotion of religious liberty supports the kind of civic virtue necessary for the maintenance of a viable political community.[101]

7. *The Value of Religion*

Religion itself can be regarded as independently valuable. Like autonomy, this consideration alone could support free exercise. Moreover, it is possible to argue that religion is deemed to be constitutionally more valuable than other forms of the good life[102] (not

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98 William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. OF CONTEMP. LEGAL ISSUES 385, 402 (1996) (observing that the interpretation of religion clauses has much to do with how we identify with our country) (citing SHIFFRIN, *supra* note 31, at 5 (making similar argument for the speech clause)).

99 Charles Taylor, *Religion in a Free Society*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 109–113 (James Davison Hunter & Os Guinness eds., 1990).

100 Abner Greene argues that constitutional limitations on the effectiveness of religious groups in the political process justify religious exemptions. *See* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1643–44 (1993). Although no legislature could base legislation upon what God's will might be on a subject, religious groups can be enormously powerful in politics. Consider the Mormons in Utah or the Lutherans in Minnesota. The inability to include religious terminology in the preamble to legislation is of little political moment. Argument ultimately based on religious foundations is routinely presented in public life, and—whether the issue be civil rights, the environment, or what-have-you—it is typically easily translated in secular terms. Finally, as will be discussed in further detail, the Establishment Clause does not generally foreclose legislatively created religious exemptions. *See infra* notes 367–81 and accompanying text. Although Greene's argument is elegantly presented, to my mind it does not present a persuasive argument for religious exemptions. On the role of religion in democratic life, see Steven Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1632–34, 1656 (1999) (arguing that neither the Establishment Clause nor democratic theory counsel against using religious argument in democratic life).

101 See *infra* notes 234–70 and accompanying text.

102 To argue that it is crueler to force one to violate one's conscience than to force one to abandon a personally vital artistic project is not to say that religion is more important than art; it is to say that violating conscience punishes more harshly wholly apart from the value of the religion or the value of the artistic project. On the other hand, if religion is independently valuable from a constitutional perspective, theological arguments for freedom of religion might then be recognized as part of the structure underlying the religion clauses. For example, Locke and others made theological arguments about the limited jurisdiction of government with respect to religion and about the unchristian character of persecution. LOCKE, *supra* note 2. To accept Lockean arguments necessarily is to reject arguments based on other theologies with different conceptions of the propriety of persecution or the relationship between church and state. This seems ironic on some readings of the Establishment Clause. *See* Smith, *supra* note 97, at 149–50, 153–66. In my view, the religion clauses are not neutral. They favor religion over nonreligion and theistic religion

merely as a hedge against discrimination, for example) even though the Constitution rightfully imposes severe limits on governmental attempts to promote religion. I will consider these contentions in the course of treating the underlying purposes and functions of the Establishment Clause.[103] For the present, however, it is enough to conclude that even if one assumes that religion has no special value under the Constitution, even if the values of the Free Exercise Clause were confined to liberty, autonomy, avoiding cruelty, stability, association, community, and the like, religious claimants would deserve special attention when the state imposed a burden on their conduct.

E. Applying the Free Exercise Clause

Special attention need not mean inevitable victory, however.[104] A prudential judgment weighing the appropriate facts and circumstances is warranted. As Donald Giannella suggested nearly forty years ago, the relevant factors include the importance of the secular governmental interests involved, the relationship of the governmental means to its interests, the impact that an exemption would have on the government interests, all balanced against the impact on religious liberty including its importance in the particular case.[105] In addition, religious equality interests should be taken into account.[106]

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over nontheistic religion. If theological grounding of the religion clauses is accepted, *see id.* at 160–64, theological partisanship is unavoidable. Although such theological arguments have a historic pedigree and independent theological appeal—for reasons that will become clear—I believe it best to restrict, to the greatest extent possible, the formal grounding of the clauses to a civic perspective, recognizing however, that any governmental arrangements will in effect not follow the prescriptions of one religion or another.

103 *See infra* Part II.

104 Indeed, even before *Smith*, courts were not particularly sensitive to religious claimants. *See* Choper, *supra* note 2, at 684; Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) [hereinafter Lupu, *Trouble*]; James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992) (tracing the cases). Aside from inflating the importance of governmental interests, the Court has exhibited a "distressing insensitivity" to what amounts to a burden on the free exercise of religion. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 945, 960–66 (1989) [hereinafter Lupu, *Rights*]. To some extent, this narrow conception of burden stems from the Court's favoring of the dominant American religious tradition over minority religions. *See* Williams & Williams, *supra* note 38, at 797 (arguing that the Court had protected "nonvolitionist religious beliefs" like most Native American religions only from facially discriminatory regulations while protecting volitionist religions from both facially discriminatory and facially neutral regulations). For particularly strong claims in favor of religious liberty, see Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 219 (1992), suggesting that voluntary crucifixion should perhaps be protected. *See also* Stephen L. Pepper, *The Case of the Human Sacrifice*, 23 ARIZ. L. REV. 897 (1981) (using human sacrifice as the vehicle for an innovative discussion of the scope of free exercise).

105 Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1390 (1967).

106 *See supra* notes 86–92 and accompanying text.

So, applying the factors isolated by Giannella to the peyote example, in my view, the religious claimant should win. Even conceding that the state interest in regulating peyote is significant, it would not be sacrificed in any significant way by a compelled religious exemption. The law against peyote consumption burdens religion in a significant way; and there are good reasons to believe that it discriminates against a minority religion. For example, if the Protestant majority ingested peyote as part of a communion service in Oregon, the law against peyote ingestion would surely have exempted religious ceremonies.[107] The *Smith* case thus reeks of insensitivity to the plight of a religious minority.[108] This is not to say that the Court believes that the equality value has no role to play in free exercise analysis, but the Court's conception leaves much to be desired. As to the nonreligious claimants, whether or not it is good policy to outlaw their conduct, there is surely no constitutional barrier. We do not live in a Kantian country. To be sure, the artist might raise a free speech claim, but even assuming his conduct fell within the scope of the First Amendment, the artist would—and should—lose.

The animal sacrifice case, however, is more difficult.[109] On the one hand, the state interest is important—animals deserve protection.[110] Surely, they deserve to be protected from the nonreligious claimants. On the other hand, the law may seriously burden religion if it prohibits people from fulfilling spiritual obligations. Moreover, there are some equality concerns. Animals are treated horribly in this society so that our meals will taste better.[111] If the state permits such vile treatment of animals for culinary reasons, might it not be hypo-

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107 Even during prohibition, mainstream religious services whose rituals required alcohol were exempt from prosecution. National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305, 308 (1919) ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as herein provided . . . .").

108 It might be argued that ingesting peyote is more dangerous than drinking wine, but the record in the *Smith* case showed that peyote ingestion in the Native American Church led members to resist drug abuse, particularly alcoholism. Moreover, the church forbade nonreligious use of peyote. *See* Employment Div. v. Smith, 494 U.S. 872, 913–16 (1990) (Blackmun, J., dissenting); *see also* McConnell, *Revisionism*, *supra* note 2, at 1135 (noting that evidence showed peyote use in the church was not dangerous and did not lead to substance abuse). *Smith*'s impact on minority religions ranges well beyond its facts. *See, e.g.*, Sullivan, *supra* note 104, at 216 (arguing that *Smith* "entrenches patterns of *de facto* discrimination against minority religions" (italics added)).

109 I am assuming that the state does not single out penalties for only those animal sacrifices performed by religious groups or in the exercise of any particular religion. Any such law would plainly be unconstitutional. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993).

110 On ethical issues concerning the relationships between humans and other animals, see ANIMAL RIGHTS AND HUMAN OBLIGATIONS *passim* (Tom Regan & Peter Singer eds., 2d ed. 1989); TOM REGAN, DEFENDING ANIMAL RIGHTS 1–27 (2001); PETER SINGER, ANIMAL LIBERATION 1–23 (2d ed. 1990).

111 SINGER, *supra* note 110, at 95–157.

critical to outlaw similar treatment for religious purposes? Another equality concern is exposed by asking whether there would be a similar prohibition if majority religions employed animal sacrifice as a part of their ceremonies. The question answers itself, but too much should not be made of the point. What if human sacrifice were an occasional part of our majority religious ceremonies?[112] Presumably, such sacrifices would not be outlawed if that were the case. But that counterfactual should not justify the inhumane practice of a minority religion.[113] Equality is an important value, but it is not all-important.

In the end, one is forced to choose between vindicating religion and stopping the inhumane treatment of animals in this context. If we suppose that the religious treatment of animals is no worse than that employed for culinary purposes or for medical research,[114] I would conclude that the equality concerns should militate toward the invalidation of a law prohibiting animal sacrifice. On the other hand, if the religious ceremony involved treatment that is worse than that employed for other, "legitimate" purposes, I would uphold the law.

These examples highlight two objections to invoking heightened scrutiny of religious burdens. The first is that the process of making such decisions is subjective. Supporting this objection is the fact that honest and intelligent people disagree on how to resolve these cases. Those Justices who employed heightened scrutiny in the peyote case were divided over the resolution.[115] The Constitutional Court of South Africa was also deeply divided over the issue in a similar case.[116] That subjectivity is involved does not necessarily mean that the decisions are arbitrary. If they were arbitrary, the Justices would be flipping coins rather than engaging in argument about recurring decisionmaking factors. Moreover, controversy frequently permeates the outcome of constitutional decisions. The underlying logic of the subjectivity objection is that if there are no obvious objective answers to legal questions, the decisions should be in the hands of the legisla-

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112 *Cf.* Pepper, *supra* note 86, at 313 ("If Catholic or Jewish beliefs prohibited photos on drivers' licenses, would they be required?").

113 To be sure, some religions may do otherwise objectionable things to animals as a sign of spiritual respect to God. The ascription of "inhumanity" in the interest of animal protection is taken from a civic perspective.

114 *See* Sidney Gendin, *The Use of Animals in Science, in* ANIMAL SACRIFICES: RELIGIOUS PERSPECTIVES ON THE USE OF ANIMALS IN SCIENCE 15–60 (Tom Regan ed., 1986).

115 Compare Justice O'Connor's concurrence in *Smith*, 494 U.S. at 891, 904–07, with Justice Blackmnn's dissent, joined by Justices Brennan and Marshall, *id.* at 907–17.

116 *See* Prince v. President of the Law Soc'y of the Cape of Good Hope, Case CCT 36/00, 2, 134–36 (2000) (freedom of religion guarantee in South African constitution did not preclude denial of admission to the bar by applicant who previously nsed and continued to use cannabis as a religious practice).

tures.[117] To fully canvass this issue, we would need to replough the ground unfurled in the debate over judicial review. We are not going there.

The second and more serious objection is that judicial review of this type violates the Establishment Clause. The idea is that the Establishment Clause forbids the favoring of religious claimants over nonreligious claimants.[118] To engage that objection, we need to determine the underlying purposes of the Establishment Clause.

II
THE ESTABLISHMENT CLAUSE

A. The Court's Approach

A good starting point[119] for exposing the complexity of the Establishment Clause is *County of Allegheny v. ACLU*,[120] where a Nativity Scene was centrally placed in a public building during the Christmas season.[121] The Court invalidated the display as a violation of the Establishment Clause,[122] but four Justices led by Justice Kennedy dissented.[123] Justice Kennedy argued that as long as there was no coercion[124] or proselytizing,[125] government should be able to recog-

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117 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 129–32 (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

118 Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961). For the claim that discrimination in favor of religious claimants violates the freedom of speech clause, see Marshall, *supra* note 98, at 393–97.

119 In a sense there is no good starting point, because it could be argued that the line of cases involving government appropriation of religious symbols is quite different, for example, from cases involving financial aid to religious organizations. One attempt to unify the multifaceted factual contexts is to analyze them using the *Lemon* test, which scrutinizes government actions for a primary religious purpose or effect, or excessive governmental entanglement. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). Many, including a fair number of justices, have attacked the test in ways that would weaken Establishment Clause protection. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319–20 (2000) (Rehnquist, C.J., dissenting) (describing *Lemon*'s career as "checkered" and collecting cases questioning it). My colleague Gary Simson has argued that the test should be strengthened in ways that so far as I can tell mark him out along with Kathleen Sullivan as the two strongest defenders of free exercise and separation of church and state (taken together) among academics. Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 935 (1987); Sullivan, *supra* note 104.

120 492 U.S. 573 (1989).

121 *Id.* at 578. The Justices also considered a display of a Chanukah menorah with a Christmas tree and a "sign saluting liberty" in front of a city-county building, but the simpler issue of the Nativity scene suffices to expose the larger issues. *See id.*

122 *Id.* at 579.

123 Chief Justice Rehnquist and Justices White and Scalia joined Justice Kennedy. *Id.* at 655. Although Justice White is deceased, Justice Thomas has since joined this voting bloc.

124 *Id.* at 659–63.

125 *Id.* at 663–65.

nize and accommodate the role that religion plays in American society.[126] Justice Kennedy thus echoed themes espoused by the religious right. In a sense he suggested that instead of recognizing a high wall between church and state, the government should be permitted to build bridges.[127] Justice Kennedy pointed to many government practices recognizing the importance of religion, from the prayer opening Supreme Court sessions[128] to Thanksgiving Proclamations by numerous Presidents,[129] as well as the existence and support of legislative chaplains[130] and a prayer room for members of the House and Senate.[131] To block Allegheny County from cooperating with this display, argued Justice Kennedy, would show hostility toward religion.[132]

Justice Kennedy and his concurring Justices clearly promote a communitarian line.[133] From their perspective, the state should be able to cooperate with those forces of society that promote virtue; the state should not alienate itself from the views of the people; indeed, in the absence of coercion, the majority of the community ought to be able to express themselves through local governments without rigid constitutional intervention. Ironically, several of the Justices who voted "for" religion in the *Allegheny County* case form a crucial part of the majority of the Court in the peyote case that not only denied the rights of the religious claimants in that case, but also would deny it in any and all cases in which a statute incidentally impacts religion even in a severe way, at least in the absence of some other constitutional interest.[134] This looks like hostility to religion in the free exercise context. It may not be pretty, but what unites the perspective of these Justices is a communitarian perspective favoring majority religions over minority religions because the majority is deemed entitled to express their religious views through the state.[135]

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126 *Id.* at 657–60.

127 William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 771 (referring to the shift from walls to bridges in a similar case).

128 *County of Allegheny*, 492 U.S. at 672.

129 *Id.* at 671.

130 *Id.* at 672.

131 *Id.*

132 *Id.* at 655, 657.

133 Although the communitarian themes seem evident in Justice Kennedy's opinion here, I do not mean to suggest that Justice Kennedy's constitutional jurisprudence routinely promotes communitarian values.

134 Here, of course, the religious right parts company with Justice Kennedy, favoring strong free exercise interpretation and weak establishment clause interpretation.

135 An alternative view would be that these Justices are simply statist, that they are replacing "an inordinate distrust of religion" with "an inordinate faith in government." McConnell, *supra* note 78, at 116. Certainly these Justices ordinarily opt for a limited judicial role with respect to the state except, for example, with respect to affirmative action, attempts to increase Black representation, the 2000 election, and some First Amendment cases. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 387 (2003) (striking down the undergradu-

The majority of the Court, however, disfavors the communitarian approach. Instead, the prevailing Justices in *County of Allegheny* take an egalitarian line. Using an approach offered by Justice O'Connor in an earlier case,[136] Justice Blackmun inquired whether the display involves an endorsement of religion.[137] An endorsement of religion is invalid because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[138] Justice Blackmun concludes that viewers may fairly understand that the purpose of the display is to endorse religion, and it is therefore invalid.[139] Taking *Smith* together with *County of Allegheny*—not to mention other cases—it would be easy to conclude that equality is the central value of the religion clauses. In *Smith*, religion and nonreligion are treated equally, and the law is upheld; in *County of Allegheny*, religion is seemingly endorsed by the state, and the law is invalidated. A proper reading of the Establishment Clause cases, however, leads to the conclusion that equality is neither a necessary condition in some cases to avoid a constitutional violation, nor a sufficient condition in other cases.

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ate admissions program at the University of Michigan); Bush v. Gore, 531 U.S. 98, 111 (2000) (employing an innovative equal protection analysis in a way that effectively decided the 2000 Presidential election); Miller v. Johnson, 515 U.S. 900, 927 (1995) (striking down Georgia's attempt to increase Black representation after Justice Department refused to preclear other plan); McConnell v. FEC, 124 S.Ct. 619 (2004) (Rehnquist, C.J., Kennedy, Scalia, and Thomas, JJ., dissenting, vote to invalidate loophole closing sections of the Bipartisan Campaign Reform Act of 2002 on First Amendment grounds). Why the activity in some spheres and not in others? My suspicion and suggestion is that these Justices' capacity to empathize with some groups more than others plays a role in their willingness to engage in searching judicial review of a state decision. McConnell also recognizes that the views of the Court appear to favor mainstream over nonmainstream religions. McConnell, *supra* note 78, at 139.

136 Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

137 *County of Allegheny*, 492 U.S. at 592–94 (Blackmun, J., joined by Brennan, Marshall, Stevens, and O'Connor, JJ).

138 *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *see also* William W. Van Alstyne, *What is "An Establishment of Religion"?*, 65 N.C. L. Rev. 909, 914 (1987) (arguing that a mingling of church and state denies equal respect owed to citizens); *cf.* Eisgruber & Sager, *supra* note 86, at 1283 (advocating an "equal regard" analysis for free exercise issues). It is possible to read this test as simply protecting the feelings of citizens. So understood, the test is vulnerable to substantial objections. *See* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 373 (1991) (arguing that "the concern with offense contained in the current religion clause doctrine should be abandoned" as inconsistent with speech clause theory and law). A better understanding of the current endorsement approach is that the feelings of a reasonable person are a proxy for whether the government has deviated from religious equality. The *deviation*, not the reaction to it, is itself the violation. The endorsement test is vulnerable to other serious objections, though most of them have bite only if applied to cases other than those involving the use of religious symbols by government. *See* McConnell, *supra* note 78, at 155–57 (arguing that the endorsement test should be modified to be a "favoritism" or "preference" test even when applied in the context of government symbols).

139 *County of Allegheny*, 492 U.S. at 598–602.

Establishment Clause analysis should take a page from the methodology employed in free speech cases.[140] That is, it should evaluate the challenged state action against the full range of Establishment Clause concerns, and it should proceed to determine if the state's promotion of particular interests sufficiently justifies the impingement on Establishment Clause concerns.[141] Examples in which the state pursues formal equality can be especially useful because they help us draw upon other interests implicated by the Establishment Clause. In the next section, I explore these other interests and subsequently apply them to specific examples.

B. Establishment Clause Values

The Establishment Clause serves multiple functions. It is a prophylactic measure that (1) protects religious liberty and autonomy, including the protection of taxpayers from being forced to support religious ideologies to which they are opposed; (2) stands for equal citizenship without regard to religion, as we have discussed; (3) protects against the destabilizing influence of having the polity divided along religious lines; (4) promotes political community; (5) safeguards the autonomy of the state to protect the public interest; (6) shelters churches from the corrupting influences of the state; and (7) promotes religion in the private sphere.

1. *Liberty and Autonomy*

A longstanding claim about the relationship between the Free Exercise Clause and the Establishment Clause is that the Free Exercise Clause protects liberty directly and the Establishment Clause protects liberty indirectly.[142] Thus, if the state sponsors school prayer, the sponsorship pressures little children to participate in the prayer. Indeed, the Court has held that a prayer at a high school graduation has this effect.[143] From the liberty perspective, those who voted for the

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140 SHIFFRIN, *supra* note 31, at 9–45 (explaining approaches employed by the Court and advocated by constitutional theorists regarding content-based and conduct-based speech restrictions).

141 Most Establishment Clause scholars do not support balancing. My colleague Gary Simson, however, explicitly argues for a form of balancing albeit more restricted than what I recommend. Simson, *supra* note 119, at 923–32 (proposing that if a law has a substantial adverse effect on the Establishment Clause, it must serve a substantial government interest in order to stand). The debate on whether to balance and, if so, how open-ended the balancing should be is, of course, well developed in the free speech context. *See, e.g.*, STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS 149 n.b (3d ed. 2001) (citing sources).

142 The liberty aspect of the Establishment Clause is emphasized in Choper, *supra* note 9, and McConnell, *Coercion*, *supra* note 9, at 941. I use the term liberty to include the right to make autonomous choices about the particular character of religious exercise to follow.

143 Lee v. Weisman, 505 U.S. 577, 598–99 (1992).

claimants in the peyote case[144] and against Allegheny County in the crèche case[145] were voting to protect religious liberty in both cases. This interpretation also addresses the objection that preferring religious claimants over nonreligious claimants in the peyote case would violate the Establishment Clause. To the contrary, if the Establishment Clause is interpreted to protect religious liberty, favoring the religious claimants in the peyote case would advance the objectives of both clauses.[146]

A particular liberty interest raised when government seeks to fund religious institutions is the right of taxpayers not to be forced to support religious ideologies to which they are opposed.[147] It is not clear to me that this interest is entitled to the weight attached to it by opponents of vouchers and other subsidies of religious institutions. If taxpayer liberty were the key issue, the appropriate remedy would be

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144 Employment Div. v. Smith, 494 U.S. 872, 907 (1990) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

145 County of Allegheny v. ACLU, 492 U.S. 573, 620–21 (1989).

146 Berg, *supra* note 1, at 452 (suggesting religious voluntarism is at the heart of both clauses); Donald A. Giannella, Lemon *and* Tilton*: The Bitter and the Sweet of Church State Entanglement*, 1971 S. CT. REV. 147, 153 (explaining the "free exercise aspect of neutrality" where religious liberty is seen as the central value of both clauses); Wilber G. Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 429–33 (1953) (maintaining that protecting religious freedom by passing legislation that would be precluded by a rule of complete church-state separation does not violate the Establishment Clause); *cf.* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 948 (1986) (suggesting that cases granting religious exemptions are ordinarily constitutional because an Establishment Clause violation requires a purpose to aid religion and significantly endangering "religious liberty in some way by coercing, compromising, or influencing religious beliefs"); McConnell, *Coercion*, *supra* note 9, at 939–40 (suggesting that accommodating religion is unproblematic because an Establishment Clause violation requires coercion or interference with religious choice); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach To Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986) (stating that both clauses support religious liberty so no tension between them). On the difficulties of relying on religious liberty alone, see CONKLE, CONSTITUTIONAL LAW, *supra* note 6, at 122. I do not mean to suggest that promoting religious liberty can never violate the Establishment Clause. Supporting the religious liberty of some, but not others, might do so. So might supporting religious liberty beyond what is necessary to prevent free exercise violations in some contexts. *See infra* notes 367–81 and accompanying text. If equality is respected, however, stopping free exercise violations can never violate the Establishment Clause.

147 Madison argued that the compulsion to pay even three pence was objectionable because it opened the door to "force him to conform to any other establishment." MADISON, *supra* note 83, at 10. Isaac Backus vigorously complained of the "extortion" involved when taxpayers were forced by the state to support religions. *See* Isaac Backus, *An Appeal to the Public for Religious Liberty*, *in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 303, 325–43 (William G. McLoughlin ed., 1968). On this aspect of religious liberty, see LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 1–26 (in colonies); 29–78 (in states) (2d ed. 1994); Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 376–77 (1992).

refunds, not prohibitions.[148] Nonetheless, this concern is worthy of some weight in an Establishment Clause balance.

2. *Equality*

If a state is permitted to endorse a particular religion, formally creating insiders and outsiders on the basis of religion, there is good reason to fear that this formal marginalization will carry over to the social and economic spheres.[149] Discriminating on the basis of religion would be subtly encouraged. In addition, complying with formal equality does not always address issues regarding substantive equality. Equality of form can be accompanied by inequality of effect. Politicians were not blind to the impact of state establishments at the outset of our history. As Leonard Levy points out in his excellent history of the establishment clause, "the American multiple establishments were nonpreferential in law and theory but not necessarily in fact. In the four New England states that maintained establishments, the Congregationalists dominated overwhelmingly, as was expected when they adopted the system of tax-supported nonpreferential aid."[150] This inequality of effect was a vital factor in the movements to eradicate the state establishments.[151]

One of the failures of the *Smith* case was its refusal to take inequality of effect seriously enough to expose the state action to serious constitutional scrutiny.[152] As we shall discuss, a similar insensitivity accompanies the Court's treatment of vouchers.[153] Nonetheless, I will argue that deviating from equality might sometimes best accommo-

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148 Another possibility would be to require that those who have religious objections give a somewhat higher amount (to assure sincerity) to charity. *See* Kent Greenawalt, *Conflicts of Law and Morality—Institutions of Amelioration*, 67 VA. L. REV. 177, 208 (1981).

149 *See, e.g.*, Pierre deVos, *South Africa's Constitutional Court: Starry-Eyed in the Face of History*, 26 VT. L. REV. 837, 854 (2002) (suggesting that marginalization of non-Christian South Africans could be linked to "social exclusion and political disempowerment").

150 LEVY, *supra* note 147, at 77; *see also id.* at 134–37; Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 878 (1986) (describing disproportionate impact as the source of "bitter religious strife"); *cf.* Alan E. Brownstein, *Constitutional Questions About Vouchers*, 57 N.Y.U. ANN. SURV. AM. L. 119, 126 (2000) ("Facial neutrality of government action does not guarantee religious equality . . . .").

151 *See, e.g.*, LEVY, *supra* note 147, at 139–42.

152 The law harmed a Native American religion, but had no impact on Christian religions or those of other traditions.

153 The Court's general handling of inequality of effect in constitutional law is perverse. For example, one of the great scandals of constitutional law is its refusal to take seriously the inequalities associated with disproportionate racial impact while studiously policing state regulations that have a disproportionate impact on interstate commerce. *Compare* Washington v. Davis, 426 U.S. 229 (1976) (holding that disproportionate impact on race does not ordinarily trigger elevated scrutiny), *with* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (holding that disproportionate impact on interstate commerce gives rise to elevated scrutiny).

date the interests at stake in particular contexts. Moreover, deviations from formal equality may sometimes be justified in the interests of substantive equality.[154]

3. *Stability*

Religious wars have plagued the world for many centuries. If the state is open for capture by religious groups, the potential for intolerance, ugly confrontation, and violence is multiplied.[155] Nonetheless, it goes too far to suggest that a significant purpose of the Establishment Clause is to assure that the polity is not divided politically along religious lines. The stability of our country does not depend upon keeping religious arguments out of public life. Indeed, churches have made many progressive contributions to the political life of the country.[156] William Brennan famously wrote in *New York Times v. Sullivan* that our Nation has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[157] It mocks that commitment to say that we believe that debate on public issues should be uninhibited, robust, and wide-open, except when it comes to religious speech. The religion clause does not contradict the speech clause. The First Amendment is not at war with itself.

Although the Establishment Clause should not be read to limit the role of religion in public debate, the concern that religious divisions can lead to violent conflicts is supportable. We live in a country in which Catholics have been beaten over disputes about the role of the Bible in the public schools;[158] Jehovah's Witnesses have been the perennial objects of maltreatment;[159] anti-semitism has been a persistent problem;[160] Muslims have been particularly victimized since the attacks on the World Trade Center,[161] and the Ku Klux Klan has spread a reign of terror designed to produce a White "Christian" America. The potential for violence is sufficiently serious to warrant caution regarding governmental actions that embrace some religions and exclude others. It may well be that the existing religious divisions

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154 *See infra* notes 367–81 and accompanying text.

155 *See supra* note 85.

156 Shiffrin, *supra* note 100, at 1646–52 (discussing the progressive contributions of religion to American democratic life).

157 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

158 JAY P. DOLAN, IN SEARCH OF AN AMERICAN CATHOLICISM: A HISTORY OF RELIGION AND CULTURE IN TENSION 56–57 (2002) (referring to Nativist church burnings and Bible riots).

159 *See generally* Blasi & Shiffrin, *supra* note 67 (documenting instances of discriminatory treatment against Jehovah's Witnesses).

160 *See* FELDMAN, *supra* note 66.

161 Discrimination against Muslims long preceded the attacks on the World Trade Center. Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 274–79 (1992).

in our country have been substantially less violent because the Establishment Clause has precluded state capture for religious purposes.

4. *Promoting Political Community*

It is possible to maintain a political community with an established religion.[162] The dangers to a political community from an established church are not as significant as those that are triggered by religious persecution. Religious persecution predictably triggers responsive hostility, but using government symbols to mark some religions as outside or at the margins of the political community is also risky. Symbolic affronts themselves undermine the kind of reciprocal respect that is helpful in supporting political community. A government that treats all citizens as insiders regardless of their religious beliefs helps to foster a more inclusive political community.[163]

5. *Protecting the Autonomy of Government*

Another historical concern is that religions will use the government to further their own sectarian ends.[164] The colonists, after all, had fled from a situation in which they believed that religions had used the machinery of the state to their disadvantage. Moreover, in the pre-Vatican II age, Protestant Americans worried that if Catholics came to power they would threaten liberties and institute the type of religious persecutions all too prevalent in Europe.[165] That these concerns were exaggerated and fueled by class and ethnic prejudice does not negate the legitimacy of a concern that religions might use government for their own ends. Indeed, the Protestants captured the public school system and used it in an attempt to instill their own religious views.[166] That they called this hegemony "nondenomina-

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162 England continues to do so to this day.

163 Conkle, *General Theory*, *supra* note 6, at 1166–69.

164 *See* Lemon v. Kurtzman, 403 U.S. 602, 623 (1971). *See generally* Marci Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, SD02 ALI-ABA 501 (1998) [hereinafter Hamilton, *Pragmatic Balance*] (exploring dangers accompanying politically powerful religious interests); Marci A. Hamilton, *Power, The Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 821 (1999) [hereinafter Hamilton, *Power*] ("Religion is not a passive participant in the political process but rather a potent presence with the capacity to overreach."); Pepper, *supra* note 85, at 18–19 (expressing concern that a church-state alliance would threaten liberty and good government). *But cf.* Ira C. Lupu, *Threading Between the Religion Clauses*, 63 LAW & CONTEMP. PROBS. 439, 445–46 (2000) (suggesting that religious groups "deserve[ ] the same political liberty as other" groups).

165 STEPHEN MACEDO, DIVERSITY AND DISTRUST 61–63 (2000) (discussing the contribution of pre-Vatican II Catholic attitudes toward liberty and democracy to anti-Catholic hostility); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 170 (2003) (referring to the "familiar" arguments about potential Catholic threats to religious liberty).

166 Conkle, *supra* note 1, at 4 ("[T]hroughout most of our country's history, there has been an overt Christian, and primarily Protestant, dominance in American law and public life.").

tional" did not successfully paper over the fact that Protestants were using government to further their own religious ends. This concern need not mean that the Establishment Clause precludes religious participation in political life. It does, however, exhibit concern that particular forms of legislation make government an instrumentality of particular religions. If government adopts a civil rights law or abolishes capital punishment in response to lobbying by religious believers, there is no Establishment Clause problem.[167] If it places a Creche in a prominent public place, it is reasonable to be concerned that religion is using government to further its own sectarian ends.

6. *Protecting Churches*

In *The Garden and the Wilderness*, Mark Dewolfe Howe emphasizes Roger Williams's contribution to the analysis of freedom of religion.[168] According to Howe, Williams warned that close connections between church and state would work to the detriment of religion. If the church is the garden and the state is the wilderness, Williams worried that the state would ruin the garden and transform it into the wilderness.[169] In fact, Williams was even more pessimistic than Howe let on. Williams fled England because the Church of England was impure and was subsequently banished to Rhode Island after he criticized the Puritans of Massachusetts for maintaining impure churches.[170] He ultimately came to believe that all churches were impure—even his own.[171] One need not fear that the wilderness might corrupt the garden because there was no garden to be corrupted.[172]

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167 MICHAEL J. PERRY, UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY 20–21 (2003); Shiffrin, *supra* note 100, at 1652–56.

168 MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 5–12 (1965); *see also* ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 46–66 (1996) (describing Roger Williams as "ahead of his time"); PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 254–57 (1953) (explaining Williams's significance to contemporary conceptions of religious liberty); EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 115–42 (1967) (describing Williams's ideas about the state and the church). On some of the personal complications of Williams, see HALL, *supra* note 35, at 17–33, 37–38; Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213, 216–19 (1999) (reviewing HALL, *supra* note 35).

169 HOWE, *supra* note 168, at 5–6, 12; Conkle, *General Theory*, *supra* note 6, at 1181–82 (endorsing Williams's view that government support of religions may be counterproductive); Van Alstyne, *supra* note 127, at 914 (arguing that state involvement with religion risks "profaning religion").

170 *See, e.g.*, MORGAN, *supra* note 168, at 24–27.

171 *See* HALL, *supra* note 35, at 27 ("Williams ultimately refused spiritual communion with everyone, including his wife.").

172 Philip Hamburger shows that Williams's theological views were extreme, but Hamburger apparently intends this as a way of discrediting Williams's political views and in that respect is unsuccessful. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 38–53 (2002).

Nonetheless, Howe was right to emphasize Williams's contribution to political thought.[173] Williams, like Madison[174] and Jefferson,[175] argued that God was not so stupid as to place the fate of religion in the hands of politicians.[176] He argued that politicians had historically operated in ways that did not benefit religion.[177] Tbis should hardly be surprising. Politicians operate with many motives. They are probably far more motivated by a desire to further the public interest than they are ordinarily given credit. But they are also often corrupted by the desire for re-election, by the need for campaign funds, and by the various foibles of human character. We have witnessed numerous cases in which *religious* leaders have violated the trust placed in them to advance the cause of religion. How much less should one expect politicians to act on behalf of religion?[178] Indeed,

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173 It is necessary to separate Williams's political arguments from their theological underpinnings. It is not necessary to believe that the number of authentic Christians constitutes a small portion of the population in order to believe that there are dangers to religion when government seeks to promote religion, hut, for Williams, this was an important truth. KRAMNICK & MOORE, *supra* note 168, at 48.

174 James Madison argued that religious establishments "instead of maintaining the purity and efficacy of Religion, have had a contrary operation." MADISON, *supra* note 83, at 12; Hall, *Civic Virtue*, *supra* note 6, at 121 ("The revolutionary generation was also repeatedly warned that government sponsorship of religion frustrated the very process of virtue creation."). Madison cautioned that government support of religion "corrupted religion itself, and thus corrupted religious capacity for generating true virtue." Hall, *Civic Virtue*, *supra* note 6, at 121. For religion to flourish, and with it the possibility for citizens to acquire the virtues necessary for self-government, "Roger Williams's wall of scparation between the fruit-producing garden and the destructive encroachment of the wilderness had to be vigorously maintained." *Id.*

175 As Jefferson put it, "I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines . . . ." Van Alstyne, *supra* note 127, at 775.,, 1905). .

176 DONALD SKAGGS, ROGER WILLIAMS' DREAM FOR AMERICA 15–17 (1993).

177 According to Williams, "Whenever civil rulers had emerged as would-be protectors or champions of religion, they had appropriated religion to profane interests—to their own quest for profit and power." KRAMNICK & MOORE, *supra* note 168, at 57; *accord* MORGAN, *supra* note 168, at 119–20; *cf.* Zorach v. Clauson, 343 U.S. 306, 320 (1952) (Black, J., dissenting) ("State help to religion injects political and party prejudices into a holy field . . . . Government should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice."); McConnell, *Origins*, *supra* note 2, at 1438 (

> It is anachronistic to assume, based on modern patterns, that governmental aid to religion and suppression of heterodoxy were opposed by the more rationalistic and supported by the more intense religious believers of that era. The most intense [colonial] religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities.

); McConnell, *supra* note 78, at 146 ("[G]overnment is unlikely to be a valuable contributor to our understanding of spiritual truth.").

178 *See* Taylor, *supra* note 99, at 103 (

> [T]he separation of church and state did not have to mean bracketing God or religion. It may have for some, but that is not the way most Americans understood disestablishment. In fact, many supported the measure in the

when politicians combine with merchants to commercialize Christmas,[179] when they invoke the name of God to justify unjust wars (often God is invoked on both sides of a conflict),[180] and when they suggest that God favors one political party over another, it becomes increasingly obvious that religion is being used to serve politics, not the other way around.[181]

Even more serious, the reliance of religious organizations upon the state for evangelical purposes tends to undermine their own integrity.[182] Indeed, there is considerable evidence that the Roman Catholic Church, the church with the historically strongest ties to the state in Europe and Latin America, has compromised its commitment to social justice in its effort to maintain its privileged position in many countries.[183] At least prior to Vatican II, Catholic support for dictators

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> name of religion, to preserve its strength and integrity from the enervating and corrupting effect of state interference.

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179 *See* Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1625–27 (1995).

180 STEVE BRUCE, POLITICS AND RELIGION 4 (2003) ("Everyone claims divine approval. All states mobilize for war by first enlisting God as their recruiting sergeant."). As Bob Dylan sang, "And that land that I live in—Has God on its side . . . . The Germans now too have God on their side . . . . If God's on our side—He'll stop the next war." BOB DYLAN, *With God on Our Side*, *on* THE TIMES THEY ARE A-CHANGIN' (Sony 1964).

181 Van Alstyne, *supra* note 137, at 914 (

> [I]t profanes religion for any secular authority to trade on its practices for its (the state's) civil or secular ends, *i.e.*, it is a trespass on religion by the state; the state has no right to take things from the voluntary communities of faith and entangle them as instruments in the conduct of civil affairs.

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182 *See* Backus, *supra* note 147, at 333–34; *see also* T.B. MASTON, ISAAC BACKUS: PIONEER OF RELIGIOUS LIBERTY 71–73 (1962) (describing Backus's distrust of evangelical uses of state power).

183 NICHOLAS ATKINS & FRANK TALLETT, PRIESTS, PRELATES AND PEOPLE: A HISTORY OF EUROPEAN CATHOLICISM SINCE 1750, at 324 (2003) (explaining that, in return for benefits from the state, the Church preached submission to the temporal authority though it practiced extensive charitable work). The Church's commitment to social justice, however, did not include a commitment to religious freedom. RENÉ RÉMOND, RELIGION AND SOCIETY IN MODERN EUROPE 173–74 (Antonia Nevill trans., 1999) (discussing the Catholic Church's resistance to religious liberty prior to 1945); J. Bryan Hehir, *Catholicism and Democracy: Conflict, Change, and Collaboration*, *in* CHANGE IN OFFICIAL CATHOLIC MORAL TEACHINGS 20, 22 (Charles E. Curran ed., 2003) ("Throughout the nineteenth century, Catholic teaching resisted the idea of religious freedom in the name of standing against philosophical relativism and for the interests of the church."). Instead the Church's commitment was to support the truth, thus the burning of heretics at the stake, the Inquisition, and the like. Although the Protestant commitment to religious freedom preceded that of the Catholic Church, it too was not easy to come by. For example, Thomas C. Berg writes:

> [As] Niebuhr pointed out, the Puritan faction in seventeenth-century England 'pled for liberty of conscience when it was itself in danger of persecution; and threatened all other denominations with suppression when it had the authority to do so.' In America, of course, it is a familiar story that the Puritans who came seeking their own religious freedom immediately denied it to others. Even after official disestablishment . . . American authorities put in place a range of preferences for generic Protestantism, despite

in some countries and opposition to them in others followed a relatively consistent pattern. If the dictator supported religious privileges such as subsidies for Catholic education, the Church did not oppose the dictator.[184] If the dictator opposed Catholic privilege, the Church opposed the dictator.[185]

There were, however, exceptions on both sides.[186] For instance, the Church was relatively quiet about Hitler despite his suppression of

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> the supposed Protestant commitment to 'soul liberty' and to the exemption of religious concerns from the cognizance of government. It has always proved difficult for religious persons to see the practices familiar to them as anything other than 'natural' and necessary to public order.

Berg, *supra* note 179, at 1612 (citations omitted).

184 Speaking of the position of the Catholic Church in many European countries well into the twentieth century, René Rémond writes:

> Imbued with the juridical tradition inherited from Rome, the [C]atholic church attached great importance to an explicit recognition of its rights, written into laws, which obviously ruled out any separation [of church and state]. The Pope continued to reaffirm as ideal a Christian state whose leaders made open reference to religion, made its teaching the rule of their actions and imposed on their nationals a respect for the obligations fixed by the church.

RÉMOND, *supra* note 183, at 160.

185 *Cf.* ROBERT P. KRAYNAK, CHRISTIAN FAITH AND MODERN DEMOCRACY: GOD AND POLITICS IN THE FALLEN WORLD 3 (2001) (

> [T]he Roman Catholic Church supported emperors and kings throughout much of its history; and although it resisted them on many occasions to defend the freedom of the church and the needs of the people, it did not really accept liberal democracy until very recently, when the Second Vatican Council (1962–65) endorsed a qualified version of democratic human rights.

); CHARLES R. MORRIS, AMERICAN CATHOLIC: THE SAINTS AND SINNERS WHO BUILT AMERICA'S MOST POWERFUL CHURCH 69 (1997) (noting that Pope Gregory XVI and Pope Pius IX maintained that it was "insanity to believe in liberty of conscience and worship or of the press"). For the claim that the Church's move to accept liberal democracy at Vatican II was preceded by other steps beginning in 1945, see RÉMOND, *supra* note 183, at 174–77. Rémond writes that the Church regarded the Enlightenment's emphasis on rationalism and its companion devotion to democracy as the major threat to the evangelical mission of the Church, but the administrations of Franco, Mussolini, Hitler, and Vichy France taught the Church that there were some things worse than democracy. *See id.* at 167–77. Accordingly, the Church simultaneously embraced liberal democracy and opposed communism. *See id.* Although Rémond's analysis is plausible when applied to the Church in France—which was in no position to push for control after its collaboration with the Vichy regime—the Church in Italy took the position that "Fascism's failing was not due to its authoritarianism, its violence or denial of democracy, but to 'its refusal to found itself on the Church and to profess itself Catholic.'" CAROLYN M. WARNER, CONFESSIONS OF AN INTEREST GROUP: THE CATHOLIC CHURCH AND POLITICAL PARTIES IN EUROPE 80 (2000) (quoting ANDREA RICCARDI, *Governo e 'profezia' nel pontificato di Pio XII in* PIO XII 31, 42–43 (Andrea Riccardi ed., 1985)). On the other hand, the American bishops supported freedom of speech and religion long before the Vatican. *See* MORRIS, *supra*, at 135 (discussing the tendency of the American bishops to ignore Vatican pronouncements when they conflicted with American conceptions of free speech and religion).

186 One exception was that the Church would often remain quiet in circumstances where speaking out would risk persecution by the government. This pattern of church behavior persisted in Mexico for much of the twentieth century, despite the courageous actions of many. *See* VIKRAM K. CHAND, MEXICO'S POLITICAL AWAKENING 153–203 (2001).

religious freedom because it calculated that its best interests were nonetheless served by keeping quiet.[187] On the other hand, strong Church forces criticized Latin American dictators despite support for the Church because they felt morally obliged to do so[188] (though the Vatican has since taken strong efforts to cut back on the political involvement of priests and bishops).[189] Although the current Pope has been willing to take unpopular positions because he thinks they are right, the Church has historically muffled its stance in favor of social justice when it thought its evangelical interests were served by doing so.[190] Indeed, for centuries, it permitted political leaders to play a major role in the selection of religious leaders.[191] As Alister McGrath

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187 For the suggestion that Pope Pius XII was relatively silent about Hitler largely because he felt that a strong Germany was necessary as a buffer against communism, see WILLIAM J. O'MALLEY, S.J., WHY BE CATHOLIC 161 (2001). *Compare* O'MALLEY, *supra*, *with* ALISTER E. MCGRATH, THE FUTURE OF CHRISTIANITY 10 (2002) ("[The] failure of the German churches to make a significant impact on Hitler's rise to power, and his gradual move toward reaffirmation of German imperial claims, raised serious questions concerning the moral credentials of Christianity . . . ."). Fear and anti-semitism surely played a significant role in the silence. *See* RÉMOND, *supra* note 183, at 168–69.

188 MICHAEL FLEET & BRIAN H. SMITH, THE CATHOLIC CHURCH AND DEMOCRACY IN CHILE AND PERU 4 (1997) (

> During the late 1960s and 1970s, the Church emerged as a critic and antagonist of repressive military regimes in several [Latin American] countries. Catholic bishops became champions of human rights and popular interests . . . .
>
> [A decade later,] Church leaders and activists helped to persuade a number of military governments to relinquish power to civilian successors . . . .
>
> The Church thus played a generally progressive role in most of Latin America during the last thirty years.

). *See generally* JEFFREY KLAIBER, S.J., THE CHURCH, DICTATORSHIPS, AND DEMOCRACY IN LATIN AMERICA (1998) (providing a comprehensive overview of the Catholic Church's role in defending human rights and promoting democracy in Central and South America from the 1960s to the 1980s).

189 BRIAN H. SMITH, RELIGIOUS POLITICS IN LATIN AMERICA, PENTECOSTAL VS. CATHOLIC 51, 67 (1998).

190 *Cf.* ATKINS & TALLETT, *supra* note 183, at 324 (suggesting the "enlightened absolutism" of the eighteenth century defined a symbolic relationship between church and state in which the church "functioned in some measure as a state bureaucracy and mouthpiece"). The Church's "political influence has been decidedly conservative for most of its history." FLEET & SMITH, *supra* 188, at 13. The Church continues to promote its evangelical interests through ties with governments when it is able to do so even in the post Vatican II context. *See infra* notes 410–14 (showing that the Church maintains privileges to teach in many European public schools). For a nuanced discussion of the power and limits of the Church's involvement in politics, see generally TIMOTHY A. BYRNES, TRANSNATIONAL CATHOLICISM IN POSTCOMMUNIST EUROPE (2001); TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICA (1991).

191 The Church moved to regain control in the middle of the nineteenth century, but it took nearly a century to complete the task. *See* RÉMOND, *supra* note 183, at 180–83. In Latin American colonies, the Church permitted political leaders to censor ecclesiastical communications including those from the Vatican. *See* JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 114 (1994). This practice was not eliminated in Brazil until 1890. *Id.*

observes, "[a] church which scents the powerful fragrance of power and influence shows a worrying ahility to become accommodating and flexible on matters which some might regard as non-negotiable."[192] If it is desirable for religious voices to play a role in the democratic process,[193] providing incentives for them to remain silent is not helpful.

Ironically, conservatives, including the religious right, are ordinarily the first in line to decry the influence of politicians in the private sphere, yet they are enthusiastic about government support for religious education and social welfare activities. The left, which ordinarily is prepared to support extensive governmental involvement in the private sphere, is quick to see the dangers when government becomes involved with religion. The left position might be recast this way: government involvement in the market is full of dangers, but the failure to intervene is even more dangerous because the market threatens to exploit labor, ruin the environment, and the like. On the other hand, the progressive might believe that the dangers of government involvement in the religious market are not outweighed by a need for intervention. It is unclear, however, why the conservative sees the dangers of intervention in the business market to be greater than the dangers of intervention in the religious market.

In any event, when Justice Kennedy complains that those who seek to prevent the Nativity Scene display are hostile to religion,[194] he ignores not only non-Christian religious believers, but also concerns about tight church-state relations within the Christian tradition that stretch back for centuries.[195] Justice Kennedy's brand of name-calling has no place in Establishment Clause jurisprudence.

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192 MCGRATH, *supra* note 187, at 12; *accord* MICHAEL M. WINTER, MISGUIDED MORALITY: CATHOLIC MORAL TEACHING IN THE CONTEMPORARY CHURCH, at xiv, 38, 56–57, 83–87 (2002); Cal Thomas & Ed Dobson, *Blinded by Might: The Problem with Heaven on Earth, in* WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT? 51, 52 (E.J. Dionne, Jr. & John J. Diulio, Jr. eds., 2000) (warning that when the clergy participate in political processes, they risk being compromised by the dangerous attraction of political power); Peter Wehner, *A* Screwtape Letter *for the Twenty-First Century: What a Senior Devil Might Think About Religion and Politics, in* WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT?, *supra*, at 41, 43 (same).

193 One might argue that religious participation in democratic life makes churches too dependent on the state. This would seem to depend on the content of the participation. Religious lobbying for church privileges would certainly be troubling, but religious lobbying on moral issues would be less worrisome.

194 County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989).

195 Hall, *Civic Virtue, supra* note 6, at 123 (arguing that "the core insight out of which the Establishment Clause originated" is that "government is powerless to create civic virtue directly without risking either social unrest or corruption of the very sources of virtue it seeks to strengthen" (footnotes omitted)).

7. *Promoting Religion*

Many argue that separation of church and state has served to promote religion.[196] Assuming this is correct, the next question would be whether promotion is a good thing or a bad thing, or, more precisely, whether promotion of religion is a constitutionally cognizable value. Before deciding this issue, we must first determine if separation of church and state has actually promoted religion.

a. *Separation Positive for Religion?*

Whether or not it is a good thing to promote religion, substantial evidence suggests that the absence of established churches in the United States has been positive for religion.[197] Most scholars, for example, conclude that the United States citizenry is more religious than their counterparts in European countries where established churches persisted for centuries.[198] As Everett Ladd writes, "by just

196 *See* ROBERT BOOTH FOWLER & ALLEN D. HERTZKE, RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES 10–11 (1995); *see also* Conkle, *General Theory*, *supra* note 6, at 1180 ("[O]ur judicially enforced separation of religion and government may well invigorate religion and work to its long-term benefit."). For a sustained argument to this effect, see ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776–1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY 18–21 (1992) (suggesting that a diversity of faiths untethered from the state is necessary for religion to thrive). It is not clear that the Framers foresaw that separation of church and state would promote religion. *See* Rakove, *supra* note 89, at 254 (Jefferson expected religion to fade; Madison did not). *But see* MOORE, *supra* note 68, at 17 (contending that the founders thought religion would prosper if government stopped enforcing religious orthodoxy or appearing to care about it).

197 *See* FINKE & STARK, *supra* note 196, at 15–16.

198 One religious leader has remarked that "[i]t would not be unduly dramatic to claim that Western Europe, at least, is suffering from a spiritual and moral crisis of immense proportions." BASIL HUME, REMAKING EUROPE: THE GOSPEL IN A DIVIDED CONTINENT 59 (1994). On the other hand, North American elites are surely as secular as European elites. PHILIP JENKINS, THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY 161 (2002); *see also* Peter L. Berger, *The Desecularization of the World: A Global Overview*, *in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 1, 10–11 (Peter L. Berger ed., 1999) (discussing a "globalized *elite* culture"). Indeed, Berger is quoted as saying that, "If India is the most religious country on our planet, and Sweden is the least religious, America is a land of Indians ruled by Swedes." HUSTON SMITH, WHY RELIGION MATTERS: THE FATE OF THE HUMAN SPIRIT IN AN AGE OF DISBELIEF 103 (2001). For the argument that religious institutions in the United States may decline in the future, see ROBERT WITHNOW, SAVING AMERICA? FAITH-BASED SERVICES AND THE FUGURE OF CIVIL SOCIETY 96–98 (2004). For the argument that European religiosity may survive the relative abandonment of religious institutions, see Grace Davie, *Europe: The Exception that Proves the Rule*, *in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS, *supra*, at 68–71; *see generally* GRACE DAVIE, RELIGION IN BRITAIN SINCE 1945: BELIEVING WITHOUT BELONGING (1994) (using a sociological approach to describe and explain religion in contemporary Britain); GRACE DAVIE, RELIGION IN MODERN EUROPE (2000) [hereinafter DAVIE, RELIGION IN MODERN EUROPE] (using the same approach to analyze European religious trends). For research suggesting that religion is more alive in Europe than is generally supposed, see ANDREW M. GREELEY, A SOCIOLOGICAL PROFILE: RELIGION IN EUROPE AT THE END OF THE SECOND MILLENNIUM 1–20 (2003) (providing statistical evidence that belief

about every measure that survey researchers have conceived and employed, the United States appears markedly more religious than its peers in the family of nations, the other industrial democracies."[199] James Madison seems to have been prescient when he argued that state-supported churches become dependent, compliant, lazy, bloated, and corrupt.[200] They lose the vitality necessary to attract and retain loyal committed followers. As suggested earlier, the Roman Catholic Church in particular seemed to lose a grip on its commitment to offer a moral voice in substantial parts of European society. The Church may have done itself no favors when it sided with Franco

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in God persists in Europe: "Europe is hardly godless"). Part of what Davie and Greeley are arguing is that the glass is half full; part is to question what measures are appropriate to focus upon. Greeley, in particular, argues that Europe is an aggregation that hides too much, that there are obvious transnational categories, e.g., age, gender, class, but the particular national experience is more important than the European experience in explaining religious phenomena. *See* GREELEY, *supra*, at xi. For example, those who generalize about Europe need to explain the religiosity of Ireland, North and South, as well as Poland. *See* BRUCE, *supra* note 180, at 44–46 (discussing interaction of religion and politics in Poland and Ireland). *See generally* Greeley, *supra* (providing sociological data on religious beliefs in various European countries). They must also account for the substantial difference on most measures between the French and those in countries such as Spain, Portugal, and Italy. In addition, for example, Greeley finds significant attitudinal differences between the Catholics of Northern Ireland and the Catholics of the South. *See id.* at 133–51.

199 Derek H. Davis, *The U.S. Supreme Court as Moral Physician:* Mitchell v. Helms *and the Constitutional Revolution to Reduce Restrictions on Governmental Aid to Religion*, 43 J. OF CHURCH AND STATE 213, 229 (2001); *cf.* Stephen M. Feldman, *Critical Questions in Law and Religion: An Introduction*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 1, 2 (Stephen M. Feldman ed., 2000) ("A 1997 Gallop Poll found that 90 percent of Americans pray, 96 percent believe in God, 63 percent give grace or give thanks to God aloud, and 42 percent attended organized religious services the previous week."). In fact, sixty percent of people believe that one can only be a Christian if he believes in the divinity of Christ; ninety percent believe that Christ actually lived; seventy percent believed he was truly God. *Id.* (remarking further that other studies document "consistently high levels of belief in life after death, heaven, and Christ's presence in heaven"). Although belief and attendance rates are generally lower in most European countries than in the United States, it would not be appropriate to describe European countries as secular: "[E]ven in the most apparently 'secular' of contemporary societies there are areas of society or of individual life where religious influences remain important." HUGH MCLEOD, RELIGION AND THE PEOPLE OF WESTERN EUROPE: 1789–1989, at 154 (2d ed. 1997). On the European demographics, see JENKINS, *supra* note 198, at 94–96 (describing the declining Christian and Catholic religious identification in European countries). Modern day commentators might well have described eighteenth century American society as secular. MOORE, *supra* note 68, at 15 ("Most Americans in 1787 neither belonged to nor regularly attended any house of worship. Church membership varied from place to place but stood somewhere around 10 percent of the total population.").

200 *See generally* MADISON, *supra* note 83, at 12–13 (explaining that a "just government" will not use clergy as auxiliaries, nor curtail the rights of a religion, nor permit one religion to interfere with the rights of another). For the claim that monopoly churches "tend to be lazy and will fail to mobilize high levels of commitment," see Rodney Stark & James C. McCann, *Market Forces and Catholic Commitment: Exploring the New Paradigm*, 32 J. FOR THE SCI. STUDY OF RELIGION 111, 118 (1993).

in Spain,[201] Salazar in Portugal,[202] the Vichy regime in France,[203] the Christian Democrats in Italy,[204] or when it was quiescent[205] in Hitler's Germany.[206] Similarly, the Anglican Church could hardly have bene-

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201 *See* McLEOD, *supra* note 199, at 16. During some of his reign, Franco nominated half of the bishops in Spain. GEORGE HUNTSTON WILLIAMS, THE CONTOURS OF CHURCH AND STATE IN THE THOUGHT OF JOHN PAUL II, at 29 (1983). Late in 1953, a new concordat lessened his control and declared Catholicism to be the only religion of the Spanish nation—though citizens were to be free to practice other religions. *See id.* In 1978, however, the Spanish Constitution disentangled church and state, declaring: "There shall be no state religion. The public authorities shall take account of the religious beliefs of Spanish society and shall accordingly maintain relations of cooperation with the Catholic Church and other faiths." C.E. Ch.2 Div.1 § 16(3), *quoted in* FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 383 (Kevin Boyle & Juliet Sheen eds., 1997). For discussion of the negative impact of the Church's embrace of Franco, see CASANOVA, *supra* note 191, at 75–91.

202 Federal Research Division, Library of Congress, Portugal—A Country Study, *at* http://www.memory.loc.gov/frd/cs/pttoc.html (last visited Sept. 6, 2004).

203 WARNER, *supra* note 185, at 71(arguing that the French Church "was undeniably an integral part of the Vichy order," that it made the mistake of condemning De Gaulle, and that in the aftermath of the war it "would no longer be viewed as the guardian of things eternal, and certainly not of France"). Even if the leaders of the French Church had wished to distance the Church from the Vichy regime—clergy were in fact divided over the desirability of the resistance—policies of several Popes had decentralized the French Church to make it less able to offer resistance to Rome, which it was richly inclined to do. *See id.* at 68–69. The byproduct of the ecclesiastical struggle was that the French Church was unable to offer a strong voice in French politics. *See id.* at 68. Interestingly, the politics of those bishops who wanted distance from Rome tended to be monarchist and conservative; those who wanted closer political ties with Rome tended to favor Republican politics. *Id.* at 62–64.

204 *See* John G. Francis, *The Evolving Regulatory Structure of European Church-State Relationships*, 34 J. OF CHURCH & STATE 775, 786 (1992).

205 Despite courageous exceptions, the complicity of German Protestants was widespread. *See* John S. Conway, *The Political Role of German Protestantism, 1870–1990*, 34 J. OF CHURCH & STATE 819, 828–29 (1992).

206 *See also* HANS KÜNG, THE CATHOLIC CHURCH: A SHORT HISTORY 176–80 (John Bowden trans., 2001); WARNER, *supra* note 185, at 188, 190 (showing that the Church encouraged the Zentrum, a German Catholic political party, to sign the 1933 Enabling Act which gave Hitler dictatorial powers, turned over birth records to the Nazis facilitating the identification of Jews, and told Catholics that they were to obey the Nazi regime); MORRIS, *supra* note 185, at 242 (citing John Diggins's suggestion that the Catholic Church was "the last organization in the world" that should have been relying on pragmatic arguments in dealing with Hitler given its claims to moral clarity regarding other political regimes). On the other hand, the Church had some distance from the Nazis enabling it to achieve a substantial amount of political damage control. *See* WARNER, *supra* note 185, at 186–92. The Church in Italy was even more successful in the latter regard. In general, "The Pope agreed to accept the Fascists and Mussolini agreed that the Catholic religion would be taught in every Italian school. He also promised to pay the salaries of Catholic priests and set up the Vatican City in Rome." BBC, *Modern World History: Fascism in Italy, at* http://www.bbc.co.uk/education/modern/fascism/fascihtm.htm (last visited Sept. 25, 2004). Despite this agreement, the Church and Mussolini had many disagreements over the years that allowed the Church to "distance itself from Fascism without also incriminating Catholicism, or appearing to reverse itself." WARNER, *supra* note 185, at 53. The demand that the Church "disown certain political and social movements in exchange for limited ecclesiastical freedoms" was a frequent problem in Eastern Europe and Third World countries. ERIC O. HANSON, THE CATHOLIC CHURCH IN WORLD POLITICS 57 (1987).

fited from its control by the English government.[207] Nor is it likely that the Church of Sweden has benefited from its association with the Swedish government.[208] In each of these countries, religiosity is now relatively low.[209] By contrast, the Roman Catholic Church sided with the Irish against England, the Poles against the Communists, and with the people against many Latin American dictators.[210] Catholicism continues to be deeply tied with the national identity in Ireland[211] and Poland[212] and is strong throughout Latin America.[213]

Citing such evidence, Jose Casanova argues that the Church's decision to oppose separation of church and state in many circumstances precipitated religious decline.[214] Moreover, Roger Finke and Rodney Stark argue that religiosity is stronger in the United States as opposed to Europe precisely because of the separation of church and state.[215] Nonetheless, any claim that the relationship between church

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207 Indeed, Roman Catholics now outnumber Anglicans in England. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2115 (2003) ("The main victim of the establishment today, if there is one, may be the established church itself."). On the prospects for an Anglican recovery and reconceptualization, see generally BEYOND COLONIAL ANGLICANISM: THE ANGLICAN COMMUNION IN THE TWENTY-FIRST CENTURY (Ian T. Douglas & Kowk Pui-Lan eds., 2001).

208 *See* Eva M. Hamberg & Thorleif Pettersson, *The Religious Market: Denominational Competition and Religious Participation in Contemporary Sweden*, 33 J. FOR THE SCI. STUDY OF RELIGION 205, 206 (1994) (claiming that individuals' religious choices can be better explained by inertia).

209 At least since Vatican II, the Catholic Church has accepted religious pluralism as a political fact, has abandoned the view that the state has the responsibility to defend and promote religious truth, and has settled on the view that the state is obliged to embrace the secular value of protecting religious freedom. *See* John Courtney Murray, S.J., *The Issue of Church and State at Vatican Council II*, *in* THE CHURCH IN THE WORLD 35, 41–44 (Charles P. O'Donnell ed., 1967). Pope Pius XI had stated as recently as 1933 that the separation of church and state was "impious and absurd." MORRIS, *supra* note 185, at 236–37.

210 *See supra* notes 188–89.

211 MCLEOD, *supra* note 199, at 20–21.

212 CHARLES TAYLOR, VARIETIES OF RELIGION TODAY: WILLIAM JAMES REVISITED 77 (2002) (observing that the French Canadian identity is bound up with Catholicism).

213 Fighting against imperialism can be a major source of growth in the Church. *See* George Scialabba, *A Faith that Shaped Today's World*, BOSTON SUNDAY GLOBE, Aug. 18, 2002, at D5 (book review) ("The faith grew astonishingly fast in the second and third centuries, especially among the lower classes . . . . Roman persecution was fitful, but even at its fiercest was unavailing. The blood of martyrs was indeed the seed of the church."). For the claim that the Church's activities on behalf of the poor—and particularly poor non-Church members—was also a significant factor in its growth, see ANTON WESSELS, EUROPE: WAS IT EVER REALLY CHRISTIAN: THE INTERACTION BETWEEN GOSPEL AND CULTURE 196 (John Bowden trans., 1994). The primary thesis of Wessels's monograph is that the evangelical success of Christianity depended upon its ability to adapt its message to the customs, habits, and rituals of the different cultures it encountered. *See id. passim.*

214 CASANOVA, *supra* note 191, at 22, 29.

215 FINKE & STARK, *supra* note 196, at 18–21; *see also* Rakove, *supra* note 89, at 254 ("[T]o judge by the results, [the] market-oriented approach offers the best explanation for the remarkable success of the American experiment in religious pluralism.") For a powerful criticism of the Finke and Stark perspective in the context of Great Britain, see Steve

and state is invariably the decisive factor for the rise or fall of religiosity would be difficult to sustain. Religion has thrived during and after many dictatorships. Consider the Constantinian dictatorship and the many that followed.[216] I suspect that Nicholas Burns goes too far when he writes that, "[w]ithout Constantine, we might not even remember Jesus'[s] name in the twentieth century."[217] Although I doubt that Burns is correct, the extent to which repression has enhanced some religions and diminished others may not be fully appreciated in much of the religion clause literature.[218] Indeed, Christianity flourishes in Central and South America[219] as well as Africa[220]—regions where dictatorships and support for Christianity have often been intertwined.

Equally significant, if religions flourish when the church is separated from the state and protections for religious freedom are in place, one might expect that religion would now be flourishing in Europe.[221] Yet Europe has emerged as the poster child for secularism.[222]

Clearly factors other than the relationship between church and state play a significant role in the sociology of religion. Corruption, or perceived corruption, in the clergy has diminished support for the

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Bruce, *The Truth About Religion in Britain*, 34 J. FOR THE SCI. STUDY OF RELIGION 417 (1995). *See also* STEVE BRUCE, GOD IS DEAD: SECULARIZATION IN THE WEST 204–28 (2002) (criticizing the Finke and Stark perspective in the context of the United States).

216 KÜNG, *supra* note 206, at 35–37 (describing Constantine's recognition of Christianity).

217 Nicholas Burns, *A Diplomat's Journey*, *in* WHY I AM STILL A CATHOLIC 66, 75 (Kevin Ryan & Marilyn Ryan eds., 1998).

218 The Catholics' forcible conversion of the Donatists yielded unanticipated consequences: "[T]he African churches, even those of Carthage and Hippo, were overwhelmed by Islam in the seventh century without resistance and vanished without a trace into history." KÜNG, *supra* note 36, at 81.

219 *See* JENKINS, *supra* note 198, at 57–58.

220 *See id.* at 56–60, 153.

221 "In all European countries, regardless of religious complexion, the state has sloughed off notions of partnership with the Church, the possible exception being Ireland . . . ." ATKINS & TALLETT, *supra* note 183, at 324. For the claim that new religions are flourishing in Europe, see Rodney Stark, *Europe's Receptivity to New Religious Movements: Round Two*, 32 J. FOR THE SCI. STUDY OF RELIGION 389, 396 (1993).

222 The probable complexity of the appropriate analysis is indicated by Jose Casanova. Krishan Kumar & Ekaterina Makarova, *An Interview with Jose Casanova*, 4 HEDGEHOG REV. 91, 92 (2002) (

> The traditional model of secularization offers a plausible account of European developments but not of American ones. The alternative American paradigm linking religious vitality to free religious markets works relatively well for the United States but not for contemporary Europe. Neither can offer a plausible account of the significant internal variations within Europe. Most importantly, neither works very well for other world religions and other parts of the world.

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Church[223] particularly in France;[224] vivid reminders of the existence of evil fuel the perception that a loving God does not exist;[225] the Church's position on birth control has troubled millions;[226] attendance is stronger in rural areas than in urban areas;[227] women are more likely to be religious than men[228] (though the Church's position on the role of women has taken a substantial toll);[229] poor people are more likely to be religious than the wealthy; and the Enlightenment,

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223 MCGRATH, *supra* note 187, at ix. Support for religion in Ireland has wavered in part because of corruption in the clergy, *see id.* at x, and presumably because of increased wealth.

224 MCLEOD, *supra* note 199, at 15, 26–29, 57, 60–62, 72, 82–83. The split between clerical and anti-clericals has long been central to French politics. KÜNG, *supra* note 206, at 155. Anticlericism need not signal a rejection of religion. For an interesting account of anticlericism in Spain, see Ruth Behar, *The Struggle for the Church: Popular Anticlericalism and Religiosity in Post-Franco Spain, in* RELIGIOUS ORTHODOXY AND POPULAR FAITH IN EUROPEAN SOCIETY 76 (Ellen Badone ed., 1990).

225 According to George Shuster, other factors "could not have decimated Christendom so savagely had it not been for the rise of the conviction that the problem of evil is beyond solution. It was the powerlessness of the individual in the face of tyranny which was so awesome and awful, so shattering and unnerving an experience." George Shuster, *Christian Culture and Education, in* THE CHURCH IN THE WORLD, *supra* note 209, at 86, 92. For discussion of the problem of evil, see SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY (2002).

226 The American experience in this regard presumably mirrors that of Europe. The Catholic Church experienced a significant decline in attendance and a substantial decline in contributions. ANDREW GREELEY, THE CATHOLIC MYTH 15–16, 23–24, 134–35 (1997). This amounted to nothing less than a historic crisis of church authority. ANDREW GREELEY, THE CATHOLIC REVOLUTION: NEW WINE, OLD WINESKINS, AND THE SECOND VATICAN COUNCIL 8, 55–57, 73 (2004).

227 *Id.* at 75–97. In some cases this phenomenon is better explained by class difference. Moreover, the hopelessness for many of urban life sometimes pushes them toward religion. TAYLOR, *supra* note 212, at 38–39. Nonetheless, socioeconomic modernization tends toward secularization. *See* PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 108–09, 130–31 (1967).

228 MCLEOD, *supra* note 199, at 28–35. One explanation for women's greater religiosity proposes that "religion stresses the 'feminine' values of kindness, empathy, and compassion, and does not value the masculine characteristics of aggression and dominance." BENJAMIN BEIT-HALLAHMI & MICHAEL ARGYLE, THE PSYCHOLOGY OF RELIGIOUS BEHAVIOUR, BELIEF AND EXPERIENCE 65 (1997). Women tend to see God as supporting, loving, and forgiving; men tend to see God as a planner, supreme power, and controller. *Id.* at 140. It is ironic that the Catholic Church would insist on limiting important ministerial functions to males although some steps have been taken to loosen the historic restrictions. *See* HUME, *supra* note 198, at 54. On the political impact of female religiosity, see MORRIS, *supra* note 185, at 46. *See also id.* ("Avoiding undue clerical influence in public affairs was advanced in the French Parliament as an important reason for denying women suffrage.").

229 *See* MORRIS, *supra* note 185, at 409–11, 423, 430. For a critique of the Church's position, see HANS KÜNG, CHRISTIANITY: ESSENCE, HISTORY, AND FUTURE 79–83, 53–62, 604–14, 752–61 (2003). For a political defense, see JENKINS, *supra* note 198, at 196, 198–200, 209.

with its emphasis on reason and science,[230] has rocked the faith of many.[231]

It is not clear, however, that these factors vary significantly between European countries and the United States. One factor that might be significant in the United States is that it was founded by religious dissenters who were intense in their religiosity and prone to form new sects rather than compromise[232] their individualistic integrity.[233] The existence of freedom of religion and believers' concomitant ability to form many different churches might have had a particularly strong impact in the United States given the religious demographics of the population. Despite the multiplicity of factors relevant to the sociology of religion, then, there is support for the view that the prohibition of tight connections between church and state has served to promote religion in the United States.

b. *The Value of Religion*

The question remains whether promoting religion is a good thing, and whether the religion clauses of the Constitution should be

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230 On the limits of a naturalistic view, see Alan Donagan, *Can Anybody in a Post-Christian Culture Rationally Believe the Nicene Creed?*, *in* CHRISTIAN PHIL. 92 (Thomas P. Flint ed., 1990). For a brilliant discussion of the relationship between scientism, religion, and romanticism, see PETER L. THORSLEV, JR., ROMANTIC CONTRARIES: FREEDOM VERSUS DESTINY (1984). *See also* REINHOLD NIEBUHR, DOES CIVILIZATION NEED RELIGION?: A STUDY IN THE SOCIAL RESOURCES AND LIMITATIONS OF RELIGION IN MODERN LIFE 5 (1928) ("The sciences have greatly complicated the problem of maintaining the plausibility of the personalization of the universe by which religion guarantees the worth of human personality; and science applied to the world's work has created a type of society in which human personality is easily debased."). On the limits of science, see HUSTON SMITH, *supra* note 198 *passim*. For the methodological atheism of Habermas, see JÜRGEN HABERMAS, RELIGION AND RATIONALITY: ESSAYS ON REASON, GOD, AND MODERNITY 78–91 (Eduardo Mendieta ed., 2002). *See also* MARGARET M. CAMPBELL, CRITICAL THEORY AND LIBERATION THEOLOGY: A COMPARISON OF THE INITIAL WORK OF JÜRGEN HABERMAS AND GUSTAVIO GUTIÉRREZ (1999) (exploring and analyzing the work of Jürgen Habermas); MARC P. LALONDE, CRITICAL THEOLOGY AND THE CHALLENGE OF JÜRGEN HABERMAS 33–37 (1999) (same).

231 On the other hand, to the extent that an emphasis on reason and science "undermines all the old certainties; uncertainty is a condition that many people find very hard to bear; therefore, any movement (not only a religious one) that promises to provide or to renew certainty has a ready market." Berger, *supra* note 198, at 7.

232 Finke and Stark argue that the uncompromising character of religious institutions is a strong factor in maintaining their power to attract and maintain membership. Thus they argue that the liberalization of Vatican II in the Catholic Church caused its lay membership and the number of priests to decline. FINKE & STARK, *supra* note 196, at 255–75.

233 In countries where Catholicism dominates, the potential for schism seems less in this post-reformation era. Catholics who can no longer live with the church frequently leave organized religion altogether. Perhaps because Protestant denominations emphasize the lack of a central authority, the potential for multiple schisms has been greater. *See* Timothy P. Schilling, *When Bishops Disagree: Rome, Hunthausen & the Current Church Crisis*, COMMONWEALTH, Sept. 12, 2003, at 15, 21 (contrasting the propensities of Catholics and Protestant to engage in schism); *cf.* FOWLER & HERTZKE, *supra* note 196, at 33 ("In Europe, if you have become alienated from the established church you likely drift away; in America you are as likely to form or join a new church.").

interpreted to favor religion over nonreligion. The debate over the utility of religion, of course, is longstanding. In his Farewell Address, George Washington maintained, "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."[234] By contrast, John Stuart Mill conceded the importance of morality, but denied the utility of religion.[235] Mill maintained that a belief in the supernatural served useful purposes in the early stages of human development, but was now dispensable.[236] He suggested that religion continued to be significant because of authority, education, and public opinion,[237] and that a supernatural foundation was no longer needed for moral beliefs. Indeed, he argued that a supernatural foundation was positively harmful in that belief in religion discouraged criticism of some flawed beliefs.[238] Mill admitted that religion would be attractive so long as

> human life is sufficient to satisfy human aspirations, so long there will be a craving for higher things . . . . So long as earthly life is full of sufferings, so long there will be need of consolations, which the hope of heaven affords to the selfish, the love of God to the tender and grateful.[239]

Nonetheless, Mill thought an alternative to what he believed to be "baseless fancies" existed.[240] Just as human beings have been willing to sacrifice all for their countries, Mill believed that they could be enticed to play their part in the destiny of the human race, a role in which they need not sacrifice themselves to the whole, but would accommodate freedom and duty.[241] He believed that they would be consoled by living the kind of life that would be admired by family or friends, dead or living.[242]

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234 George Washington, Farewell Address (Sept. 17, 1796), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 213, 220 (James D. Richardson ed., 1898); *cf.* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (George Lawrence trans., J.P. Mayer ed., 1966) (

> I do not know if all Americans have faith in their religion—for who can read the secrets of the heart?—but I am sure that they think it necessary to the maintenance of republican institutions. That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks.

). MOORE, *supra* note 68, at 15 ("We . . . know that, whether [the framers] were Deist or Congregational or Episcopalian, or not much of anything, they shared an important assumption: Religion was the foundation of virtue.").

235 John Stuart Mill, *Utility of Religion*, *in* NATURE AND UTILITY OF RELIGION 50–51 (George Nakhnikian ed., 1958).

236 *Id.* at 63–65.

237 *Id.* at 51–59.

238 *Id. at* 46–47, 65.

239 *Id.* at 68.

240 *Id.*

241 *Id.* at 71.

242 *Id.* at 70–71.

Many have been moved by humanistic ideals like Mill's. Moreover, it is hard to deny the force of public opinion. If religion were authoritatively regarded as superstition in a society, socialization against religion would be powerful, and it might be possible to organize a society around the humanistic appeals of Mill.[243] Indeed, those humanistic appeals are present in any religion worthy of the name. As Reinhold Niebuhr puts it, "morality is as much the root as the fruit of religion."[244]

But we do not write on a clean slate. For millions of citizens, religion fills a need that humanism does not fill. For those citizens, the dominant religions in the United States provide an explanation of the mysteries of the universe,[245] a ground for the importance of personality in an impersonal world,[246] a sense of obligation and mission not provided by humanism,[247] and a "guaranteed security against the forces of nature."[248]

Moreover, religious institutions regularly maintain rituals and other events that create opportunities for moral reflection and encourage believers to come together. This makes religiously based moral practice less lonely than humanism and provides more social support for its burdens. Such community-centered events are not incompatible with secular humanism, but they are relatively rare, partic-

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243 For the argument that many east Asian countries have been organized—with considerable success—through the aggressive promotion of a form of secular humanism, see T.R. REID, CONFUCIUS LIVES NEXT DOOR: WHAT LIVING IN THE EAST TEACHES US ABOUT LIVING IN THE WEST 227–28, 246 (1999).

244 NIEBUHR, *supra* note 230, at 14.

245 For reflections on living without an explanation, see THOMAS NAGEL, WHAT DOES IT ALL MEAN: A VERY SHORT INTRODUCTION TO PHILOSOPHY 95–101 (1987).

246 NIEBUHR, *supra* note 230, at 4.

247 *See generally* HANS KÜNG, WHY I AM STILL A CHRISTIAN 57–65 (David Smith trans., 1987) (1985) (stressing the idea of being a disciple).

248 NIEBUHR, *supra* note 230, at 5; *see also* MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 69–70 (1991) ("One polar response to the problem of meaning is to conclude that life is, finally and radically meaningless . . . . The other polar response, . . . is 'religious': the trust that life is ultimately meaningful, meaningful in a way hospitable to our deepest yearnings."); JONATHAN SACKS, THE DIGNITY OF DIFFERENCE 82 (2002) (remarking that religions are "a significant space outside of and in counterpoint to a late-modern Western culture that tends systematically to dissolve the values and virtues that give meaning to a life"); Marshall, *supra* note 138, at 387 ("Religion addresses the most important questions at the core of human existence—the existential questions of meaning, morality, and the nature of Truth. It provides many with a sustaining meaning for life—and an explanation for death."). Marshall, however, argues that the psychological need to hold on to these explanations leads to intolerance particularly when everlasting life is thought to be at stake. *Id.* at 388–90. On the latter point, see William P. Marshall, *The Other Side of Religion* 44 HASTINGS L.J. 843, 858 (1993) (suggesting religious believers may view forces that assault their religious structure "as threatening evils that must be eliminated"); *cf.* Berg, *supra* note 179, at 1589–90, 1596–97 (suggesting that believer's recognition that only one God exists can induce humility, but can also lead to false absolutes and arrogance).

ularly outside educational settings. By comparison, then, secular humanist moral agency is rather isolated.[249]

Whether religiosity is desirable from a political perspective, however, is open to question. Measuring the extent to which religion promotes altruism is tricky business.[250] To the extent there is a case for religion in this regard, it lies among the group that is religiously active in significant ways. Nonetheless, the overall impact of religion on altruistic behavior is arguably suspect. For example, as Mary Ann Glendon observes, "[c]rossnational studies repeatedly show that the proportion of children in poverty in the United States is greater than in other countries with which we frequently compare ourselves."[251] If altruism were connected with religion, one might have expected the "religious" United States to take better care of its poor children than secular Europe. On the other hand, Europeans remain influenced in their values by a prior religious history[252] and they are more comfortable with a strong government welfare role. Nevertheless, some sociologists wonder whether, as Europe continues to secularize, its commitment to humane values will wane.[253] In any event, whatever the comparative dimensions with Europe, it is hard to ignore the substantial role played by religious associations in directly assisting the poor.[254]

Even if religion does not promote altruism, there are grounds to believe that religious associations promote civic participation[255] and provide moral and political criticism uncontaminated by the profit

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249 Thanks to Seana Shiffrin for the points made in this paragraph.

250 The evidence regarding actual congregant behavior is mixed. *See* BEIT-HALLAHMI & ARGYLE, *supra* note 228, at 200–03. But churches surely work to promote altruism and oppose the notion of "every man for himself." HUME, *supra* note 198, at 14; *see also id.* at 48 (arguing that "it is important for the churches to stress the moral imperative to help those in need").

251 GLENDON, *supra* note 55, at 107.

252 HANS KÜNG, ON BEING A CHRISTIAN 28–31 (1978).

253 For extensive discussion relevant to this issue, see DAVIE, RELIGION IN MODERN EUROPE, *supra* note 198, at 38–194.

254 Peter Dobkin Hall, *The History of Religious Philanthropy in America, in* ROBERT WUTHNOW ET AL., FAITH AND PHILANTHROPY IN AMERICA: EXPLORING THE ROLE OF RELIGION IN AMERICA'S VOLUNTARY SECTOR 38, 38–39 (1990) (churches and denominationally tied institutions account for close to two thirds of philanthropic contributions); Robert Wuthnow & Virginia A. Hodginson, *in* WUTHNOW & HODGKINSON ET AL., *supra*, at xiii ("Millions of Americans regularly attend religious services, and a large proportion give of their time and money to charitable causes and voluntary organizations.").

255 FOWLER AND HERTZKE, *supra* note 196, at 32 ("On the social and civic level, religious people are more likely to give to charity, vote, and be influenced in community activities than the nonreligious."). Obviously other associations promote civic virtue, but the contribution of religion to civic virtue can in combination with other factors serve to justify special constitutional protection. *See, e.g.*, Hall, *Civic Virtue, supra* note 6, at 112–17 (arguing that religious liberties should be protected on several grounds, including that religion serves a distinctive role in value inculcation and the production of civic virtue).

motive.[256] For example, there are strong grounds to credit religious groups with positive efforts for social change in American history. Religious leaders and groups have played important roles in movements to abolish slavery, acquire rights for workers in a wide variety of contexts, grant women suffrage, obtain civil rights for African Americans and other minority groups, and a number of other progressive causes.[257] Moreover, religious groups have been an important force in lobbying for the poor[258] as well as providing direct services.[259] From a political perspective, I believe that religion has on balance been a positive political force in the United States[260] and a negative force in Europe.[261]

Even if those who follow religious precepts are more altruistic than their nonreligious peers, and even if religious associations promote civic values, it has to be admitted that deep religious commitments have led to intolerance, discrimination, and violent civil and international wars.[262] But there is more. Perhaps the dominant strain of Protestantism in the United States has stressed the importance of faith as opposed to good works, concern about a good life in the next world at the neglect of this one,[263] and the virtue of accepting busi-

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256 *See* CARTER, *supra* note 74, at 112.

257 *See* Shiffrin, *supra* note 100, at 1648–50.

258 On the contributions of religious groups to grassroots progressive movements, see Richard Parker, *Progressive Politics and Visions and, Uh, Well . . . God, in* WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT?, *supra* note 192, at 56.

259 Amy L. Sherman, *Faith in Communities: A Solid Investment*, 40 SOC'Y 19 (Jan./Feb. 2003).

260 Shiffrin, *supra* note 100, at 1646–52.

261 Particularly important in this connection is the extensive period in which the Church opposed democracy and religious liberty.

262 KÜNG, *supra* note 206, at 137–38 ("Christianity had shown itself incapable of peace," contributing to modern secularization.). The prospect of religious wars in the third world is quite real. *See* JENKINS, *supra* note 198, at 13. On the other hand, I wonder how much of the violence apparently attributable to religion might have occurred in any event with some other method of creating the Other who needed to be slain. Hitler and Stalin, for example, did not need religion to support mass murder. *See* JOHN GRAY, AL QAEDA AND WHAT IT MEANS TO BE MODERN 2 (2003); *see also* O'MALLEY, *supra* note 187, at 136 ("Surely the war in Northern Ireland today has nothing whatever to do with whether the pope is the vicar of Christ."); SACKS, *supra* note 248, at 5–6 (arguing the causes of conflicts in which sides are divided along religious lines are frequently political or economic). Having said that, I do not mean to deny that one of the disadvantages of religion is that it has played a substantial role in creating violence. One of the explanations for this is that the human need to feel a sense of certainty about religious matters—as opposed to feelings of insignificance and chaos—breeds intolerance about those who have reached different conclusions. For powerful development of this position, see Marshall, *supra* note 248, at 854–59. Marshall is careful to observe that the tendency toward intolerance is not a property of all religions. *See id.* at 853.

263 For many decades in the twentieth century, the American Catholic Church's emphasis on loyalty and patriotism, rocking the boat only in areas of special interest for religious freedom, may have had political effects similar to the dominant strain of Protestantism (though Catholicism was socially segregated from the modern culture). For an excellent description of Catholic culture in the first six decades of the twentieth century and the

ness and governmental institutions as they are, thus encouraging a predominantly secular economy where business is business, and entrenching predominantly secular political institutions where naked self-interest dwarfs ethical considerations.[264] These emphases on faith, the next life, and acceptance of one's lot in the current life are hardly likely to yield an active, engaged citizenry.

Even if religion generally produces an engaged citizenry, certain aspects of many religions unquestionably run counter to the public good—at least from a progressive perspective. Consider the teaching of conservative religions about the role of women in the family and society,[265] about birth control, and homosexuality.[266] Consider the impact of conservative religious teachings on tolerating others.[267] And, then, there is the issue of hell. It is questionable whether the traditional doctrine of hell is psychologically productive for anyone,[268] let alone children.[269] In the absence of religion, a family that threatened its children with eternal torture[270] for sexual indiscretions would presumably be guilty of child abuse.

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factors which caused it to change, see MORRIS, *supra* note 185, at 113–281. For one view of the various Muslim perspectives, see L. CARL BROWN, RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS 175–80 (2000) (cautioning against an assumption that Muslims share uniform beliefs about engagement with political processes).

264 *See* NIEBUHR, *supra* note 230, at 11–18. On the relationship between Protestantism and economic attitudes, Niebuhr seems to follow Max Weber and R.H. Tawney. *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Stephen Kelberg trans., 2001) (1904–05); R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM: A HISTORICAL STUDY 227–53, 277–87 (Harcourt, Brace, & World 1962) (1926).

265 For a brilliant Catholic feminist critique and reconstruction of traditional Catholic teachings about Mary, see ELIZABETH A. JOHNSON, TRULY OUR SISTER: A THEOLOGY OF MARY IN THE COMMUNION OF SAINTS (2003).

266 For a critique of the historically negative stance taken by Christianity on sexuality, see JAMES B. NELSON, BETWEEN TWO GARDENS: REFLECTIONS ON SEXUALITY AND RELIGIOUS EXPERIENCE 14–15, 85–95 (1983).

267 For the claim that the Puritan doctrine separating the elect from the immoral others has played a dominant role in American history, see MORONE, *supra* note 35, at 39–41.

268 It is easy to see how the doctrine can lead to intolerance. *See* Marshall, *supra* note 248, at 854–59.

269 HANS KÜNG, ETERNAL LIFE? 131 (Edward Quinn trans., 1984) (1982) ("The problem of hell may not be dismissed in silence if only because the *fear of hell*—which has become a proverbial expression—has done immense harm over the course of centuries.").

270 There are alternatives to the literal interpretation. Indeed, as Ellen Badone observes, "since the 1950's Catholic teachings on Hell and Purgatory have changed dramatically." Ellen Badone, *Introduction, in* RELIGIOUS ORTHODOXY AND POPULAR FAITH IN EUROPEAN SOCIETY 7 (Ellen Badone ed., 1990); *see* RICHARD P. MCBRIEN, CATHOLICISM 1176–77 (1994) (suggesting that it is not clear that persons actually go to hell and conceiving hell as separation and isolation or as nonbeing). For a subtle discussion about the possibility of eternal damnation, see KARL RAHNER, THE CONTENT OF FAITH: THE BEST OF KARL RAHNER'S THEOLOGICAL WRITINGS 634–37 (Karl Lehmann & Albert Raffelt eds., Harvey D. Egan, S.J. trans., 1994).

c. *The Constitutional Value of Religion*

Conceding that there are arguments on both sides on the civic value *vel non* of religion, the question remains whether it is reasonable to interpret the religion clauses to favor religion.[271] Of course, part of the motivation for the Establishment Clause was unconcerned with the value of religion. The Establishment Clause was designed to ensure, among other things, that the federal government did not interfere with the then-reigning state establishments of religion.[272] This does not mean that the Framers favored tight connections between church and state, however. Far more likely, the Framers respected the autonomy of states to conduct their own affairs. They plainly did not believe that tight connections between church and state at the federal level would be good for religious liberty.[273]

Beyond federalism, a substantial theme of the Framers favoring separation of church and state sounded in religious reasons. The notion was that some things belonged to God and others to the state.[274] Moreover, the Framers seemed generally to value religious commitments over nonreligious commitments, with many like George Washington believing that the nurturing of religion was necessary for the

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271 For arguments that it should be so interpreted, see GARVEY, *supra* note 63, at 49–57, which argues that religious freedom is protected because the law views religion as a good thing. *Cf.* Smith, *supra* note 97, at 157 (contending that a religious justification for religious freedom had substantial force in the founding period). For arguments against, see Eisgruber & Sager, *supra* note 86, at 1248, which maintains that religious practices should be protected not because of their value, but because they are susceptible to discrimination. The Framers certainly had no interest in promoting false religions. This was one of the reasons for the notion that persons should not be forced to support religions to which they were opposed. TRIBE, *supra* note 6, at 1160–61. Moreover, the early American church histories were written to allay the worry that disestablishment would promote quack religions and undermine the morality of the nation. MOORE, *supra* note 90, at 5–13.

272 *See* Conkle, *supra* note 6, at 1132–35. *But cf.* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18–19 (1995) (arguing that the exclusive purpose of the Establishment Clause was to assign jurisdiction over religious issues to the states); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157–60 (1991) (applying the Establishment Clause against states eliminates the states' rights to establish religion—a right the clause itself explicitly confirms); Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 3 (1996) (accord).

273 CONKLE, CONSTITUTIONAL THEORY, *supra* note 6, at 1134 ("The national government was conceived as a government of limited and enumerated powers, and these powers did not extend to matters of religion."); *see supra* note 174.

274 John Locke was influential in this regard. LOCKE, *supra* note 2, at 26–30; *see also* MADISON, *supra* note 83, at 9–10 ("[I]n matters of religion, no man's right is abridged by the institution of Civil Society, and . . . Religion is wholly exempt from its cognizance."); Michael McConnell, "God is Dead and We Have Killed Him!": *Freedom of Religion in the Postmodern Age*, 1993 BYU L. REV. 163, 167–70 [hereinafter McConnell, *God is Dead*] (discussing the lack of government power over the soul); Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1245–50 (2000) (exploring the relationship of two-kingdoms theology to the First Amendment). This argument has also been used to oppose democracy. *See* KRAYNAK, *supra* note 185, at 45–106.

promotion of civic virtue.[275] On the other hand, Thomas Jefferson did not favor promoting institutional religion.[276] He believed, among other things, that it was unnecessary. From Jefferson's perspective, God had already supplied us all with a moral sense.[277] Indeed, Jefferson hoped that traditional religion would fade away.[278] The presence of the Enlightenment theme in the foundation of the republic cannot be ignored.[279]

Moreover, there are serious grounds to question whether it is reasonable to interpret the religion clauses as proceeding from a religious foundation in the more pluralistic and skeptical age in which we live.[280] One approach to this might be to say that an overlapping consensus of the religious (more precisely, most of the religious) and nonreligious support freedom of religion,[281] and that the clauses should not be interpreted to favor one side over the other. From this perspective, if the separation of church and state promoted religion, the Constitution would be indifferent. The promotion of religion

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275 *See supra* note 234 and accompanying text.

276 EUGENE R. SHERIDAN, JEFFERSON AND RELIGION 67–68 (1998) (describing Jefferson as revering Jesus as a moral reformer, but rejecting the Bible as divine revelation and rejecting Christianity's theological, metaphysical, and ecclesiological doctrines as corruptions of Jesus's message).

277 *Id.* at 19. For intellectual history relevant to this view of conscience, see LINDA HOGAN, CONFRONTING THE TRUTH: CONSCIENCE IN THE CATHOLIC TRADITION 1–99 (2000).

278 *See* MOORE, *supra* note 68, at 15 (explaining that Jefferson and other Deists found evidence of God in the "machine-like perfection of the natural order"); Rakove, *supra* note 89, at 254 (noting that Jefferson hoped religious discussion would produce "rational deists"). Although Jefferson opposed doctrines associating Jesus Christ with the divine, he ultimately came to favor Christian moral teachings. *See* SHERIDAN, *supra* note 276, at 68 ("If the acceptance of orthodox Christian doctrines produced virtuous lives, he welcomed the result without approving the cause.").

279 William Lee Miller argues that religion cannot be viewed as the sole and necessary foundation of American institutions. *See* William Lee Miller, *The Moral Project of the American Founders*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY, *supra* note 99, at 17, 35 (

> The Enlightenment, with its edge of skepticism, was too much present in the Revolution, in the new nation's institutions, in key founders, in the mind of significant segments of the people—and, in effect, in the great silences and protections and negations of the Constitution itself—for that to be persuasive.

). Instead, he maintains that the distinctive feature "of the American beginning was neither the religious underpinnings nor the emancipation from them but the combination." *Id.* at 37. Nonetheless, the Enlightenment theme in the United States was not as hostile to religion as it was in Europe. *See id.* In part, this was because those who supported religion also supported republicanism, contrary to the pattern in Europe. *See id.*

280 Although the original intent of the Framers is relevant to constitutional adjudication, multiple sources should guide constitutional interpretation. Shiffrin, *supra* note 53, at 1197–98. *But see* McConnell, *God is Dead*, *supra* note 274, at 168–72 (placing stress on original intent).

281 *Cf.* Berg, *supra* note 179, at 1581–82 (suggesting there was an overlapping consensus about the purposes of the religion clauses at the founding, but arguing that the rise of the welfare state tears the consensus apart). Of course, in the concrete, no consensus exists as to how to define religious freedom in specific contexts.

might be a fact; it might be valued by many; but it would not be a constitutional value.[282]

Although there is much to commend in the overlapping consensus approach as an ideal, it seems clear that government has favored religion, at least to a limited extent, throughout our constitutional history, and that this favoritism has not been regarded as unconstitutional. As I will discuss below, the presence of "In God We Trust" on coins, for example, is a non-trivial indication that government can favor religion in some contexts without violating the Constitution. One way to look at this is that the Constitution favors religion over nonreligion, but that there are limits to which the government can promote religion both out of respect for non-believers and for reasons that appeal to many religious believers. Alternatively, one could posit that the Constitution is indifferent about the fate of religion, but compromises supporting religion have been made along the way. As I will suggest in connection with discussion of the Pledge of Allegiance and "In God We Trust," I think the latter perspective is at odds with our constitutional history. It seems reasonable to interpret the religion clauses as favoring religion,[283] but with significant limitations on how that favoritism may be expressed. Such a position does not undercut the protection of free exercise for non-believers. If there is one proposition unanimously favored in religion law, it is that the decision to accept or reject religion should be a voluntary matter.[284] Moreover, the Free Speech Clause, Article VI, clause 3, prohibiting religious test oaths for public office,[285] and the Equal Protection Clause, also make clear that our Constitution does not tolerate governmental discrimination against the nonreligious.

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282 The same could not be said from this perspective of the Roger Williams's concern that the wilderness of the state would compromise the garden of religion. *See supra* notes 168–95 and accompanying text. From a religious perspective, protecting religions from the corrosive effects of state interference is of religious importance. From the perspective of the nonreligious, compromising the garden of religion might or might not serve civic purposes.

283 Certainly an attempt to justify the religion clauses from anti-religious premises would be a non-starter. As I will ultimately suggest, given the plurality of positions, there is no neutral ground to stand upon.

284 Indeed, Thomas Berg argues that "the reliance on religious voluntarist beliefs to ground religious freedom is not the sort of reliance that amounts to real favoritism or preference for religion or a particular faith." Berg, *supra* note 32, at 734. Instead, the voluntarist principle is intended to "give equal liberty to all beliefs." *Id.* Although the government may rely upon one specific belief to ground the general principle, this fact "does not in itself create any favoritism in how government actually treats its citizens—and again, it is how government actually treats citizens, not the grounds on which it relies, that is most important to neutrality." *Id.*

285 U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States."). On the significance of this provision, see KRAMNICK & MOORE, *supra* note 168, at 26–45.

Nor does such a position do much to endorse general governmental involvement in the religious sphere to promote religion. Favoring religion ordinarily counsels *against* government action designed to favor religion. Distrust of politicians is not only a mark of our system of checks and balances; it is a fundamental ingredient of the religion clauses.[286] Nonetheless, the Establishment Clause cannot fairly be read to preclude all actions by politicians that favor religion any more than the Free Exercise Clause precludes all state actions with a negative impact on religion. Although there are easy cases, applying the Establishment Clause frequently calls for nuanced practical judgments that cannot be reduced to simplistic formulas.

C. Applying the Establishment Clause

Applying the Establishment Clause is a more complicated enterprise than applying the Free Exercise Clause. When government impacts religious liberty directly, all the values underlying the Free Exercise Clause are potentially in play, and they all point in the same direction. Unlike the Free Exercise Clause, Establishment Clause values frequently come into conflict with each other. This complexity forces a more extended discussion of applications than was necessary with the Free Exercise Clause. But in many ways the question of Establishment Clause applications is more interesting than Free Exercise applications, partly because of the greater richness produced by conflicts between values, partly because they force deeper inspection of the relationship between religion and government, and partly because so many of the cases arise out of controversies affecting our children in the schools.

Perhaps there is a natural human tendency to transform the complex into the simple, and the *Allegheny County* case is a model case for those who would reduce the Establishment Clause to a simple equality model. The county's action favors Christianity. This it may not do. End of case. If equality were the sole value underlying the Establishment Clause, one would expect that governmental deviations from religious equality would invariably be unconstitutional and that government conformity with equality would invariably be constitutional. But neither of these propositions are correct. Government deviations from equality are frequently constitutional. For example, governmentally sponsored monotheistic prayers are ordinarily constitutional, at least outside the context of public schools;[287] government frequently takes positions that contradict religious doctrine without

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286 *See* Berg, *supra* note 179, at 1630–31.

287 Compare, for example, the treatment of government prayers such as "God save this honorable Court" with cases such as *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), striking down school sponsored prayer at football games, *Lee v. Weisman*, 505 U.S. 577

violating the Establishment Clause;[288] and government ordinarily may remove obstacles from religious practice in ways that discriminate against or burden nonreligious actors.[289] Similarly, conforming with equality does not immunize government from Establishment Clause liability. For example, government may not permit religious teachers in public school classrooms even if it does so on an equal basis. Equality's explanatory power is thwarted precisely because of the pluralistic foundations of the Establishment Clause.

1. *Acceptable Deviations from Equality*

a. *Monotheistic Prayer*

Justice Kennedy's claim that those who oppose the action of Allegheny County are hostile to religion[290] is widely shared. Many worry that the absence of religious symbols from public life would create the impression that religion is unimportant, not part of the lives of the American people, and not something that should be part of the lives of children. They worry about the consequences of a political culture devoid of religious symbolism. They worry about the consequences of maintaining a "naked public square."[291]

In response to such worries, much public ceremony contains reference to or prayers to God designed to counter the impression that the United States is a Godless government. The formulation and use of the Pledge of Allegiance is one of many governmental actions that pay homage to God. Some such efforts have been declared unconstitutional. For example, the Court struck down prayer[292] and Bible readings[293] in public school classrooms some four decades ago. Nonetheless, Supreme Court Justices have routinely suggested that the Pledge of Allegiance was not constitutionally problematic. These statements have now been challenged.

Shortly before the fourth of July, 2002, Judge Goodwin of the Ninth Circuit Court of Appeals wrote an opinion declaring that the words "under God" in the Pledge of Allegiance violate the Establishment Clause.[294] It was not a hard argument to make. Far from being

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(1992), striking down school sponsored prayer at graduation, and *Engel v. Vitale*, 370 U.S. 421 (1962), striking down state sponsored prayer in classrooms.

288 *See supra* Part II.C.1.b.

289 *See supra* Part II.C.1.c.

290 *See* County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring).

291 *See generally* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984) (arguing that the idea of America as a secular society is "demonstrably false" and "exceedingly dangerous").

292 *Engel*, 370 U.S. at 436.

293 Sch. Dist. v. Schempp, 374 U.S. 203, 223–27 (1963).

294 Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002) (judgment stayed on June 27, 2002, pending en banc review). The opinion was ultimately withdrawn in favor of an

a lasting tradition reaching to the beginning of the Republic, the words had been added to the Pledge by Congress in the 1950s.[295] The Supreme Court had clearly stated that it was unconstitutional for the state to promote religion.[296] But, as Goodwin pointedly observed, the "under God" amendment not only endorsed religion over nonreligion, it endorsed monotheism over polytheism.[297] Indeed, its unmistakable purpose was to endorse and promote religion. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."[298]

Persons from very different traditions could support the Goodwin opinion. Obviously, strong followers of the Enlightenment tradition would find the opinion congenial. If you think that belief in God is just superstition, believed because of fear or ignorance, then the idea that children should be encouraged to pledge allegiance to a flag "under God" is difficult to swallow.[299] But traditional religious believers can support the opinion on the ground that, among other things, the mixture of politics and religion works to the detriment of religion.

Whether viewed from a nonreligious perspective or a religious perspective, then, the Goodwin opinion had much to recommend it. Nonetheless, one need not have been a constitutional lawyer to predict that the Court would find a way to overturn the Ninth Circuit, and in *Elk Grove United School District v. Newdow*, reverse it did.[300] Six

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opinion declaring unconstitutional a school district policy requiring the recitation of the Pledge of Allegiance daily by willing students in each elementary school class, but not invalidating the Congressional act adding the words under God to the Pledge. Newdow v. U.S. Congress, 328 F.3d 466, 483, 490 (9th Cir. 2003), *cert denied*, 124 S. Ct. 383 (2003), *and cert. granted sub nom*, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 384 (2003).

295 *Newdow*, 292 F.3d at 600.

296 Everson v. Bd. of Educ., 330 U.S 1, 15–16 (1947).

297 *Newdow*, 292 F.3d at 607–08; *cf.* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

298 *Newdow*, 292 F.3d at 609 (*quoting* 100 CONG. REC. 8618 (1954)).

299 Of course, many nonreligious products of the Enlightenment would argue that there is a moral order and that the U.S. Constitution is best understood as requiring that the government create and comply with that order. While the writers of the Declaration of Independence looked to God as the source of that order, nonreligious moralists find that

> the order is grounded in nature alone, or in some concept of civilization, or even in supposedly unchallengeable a priori principles, often inspired by Kant. So that some Americans want to rescue the Constitution from God, whereas others, with deeper historical roots, see this desire as doing violence to it. Hence the contemporary American Kulturkampf.

TAYLOR, *supra* note 212, at 70. For an argument that the existence of a moral order shows the existence of God, see C.S. LEWIS, MERE CHRISTIANITY 3–32 (rev. ed. 1953). For additional discussion of that issue, see ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 360–62 (1995).

300 542 U.S. ___, 124 S. Ct. 2301, 2312 (2004).

Justices reversed on a procedural ground, arguing that Newdow did not have standing to bring the action.[301] Three Justices, however, namely, Chief Justice Rehnquist and Justices O'Connor and Thomas disagreed with Judge Goodwin on the merits.

Analyzing Judge Goodwin's opinion requires separation of two issues: First, is the Pledge a *religious* exercise, and, second, can a government actor constitutionally require that the Pledge be part of the official public school day? Chief Justice Rehnquist and Justice O'Connor both denied that the Pledge was a religious exercise[302] and, therefore, concluded that it could be a part of the official public school day. Justice Thomas conceded that the Pledge was religious,[303] but, for reasons I will not explore here,[304] argued it was constitutional nonetheless.[305] I will argue that the Pledge is religious and that it is constitutional for Congress to encourage its use, but that it should not be considered constitutionally permissible to use the Pledge in public school classrooms.

How does one argue that the Pledge with its "under God" language is *not* religious? Chief Justice Rehnquist argues that the Pledge is a patriotic exercise, not a religious exercise.[306] On one reading of the opinion, the Chief Justice is suggesting that "under God" simply refers to what he regards as a historical truth, namely that "our Nation was founded on a fundamental belief in God."[307]

Elsewhere in the opinion, however, he states that "under God" "might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority."[308] These are quite obviously theological

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301 *Id.*

302 *Id.* at 2319–20 (Rehnquist, C.J., concurring); *id.* at 2327 (O'Connor, J., concurring).

303 *Id.* at 2329–30 (Thomas, J., concurring).

304 I make some remarks on the incorporation of the Establishment Clause issue in Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717 *passim* (2003).

305 *Elk Grove*, 124 S. Ct. at 2330 (Thomas, J., concurring). Justice Thomas argued that the Establishment Clause did not apply to the states and, if it did, it would only prevent coercion by force of law or penalty which the pledge policy did not do. *Id.* (Thomas, J., concurring). As Justice Thomas understands, his rendition of the Establishment Clause would "probably cover little more than the Free Exercise Clause." *Id.* at 2328 (Thomas, J., concurring). From the perspective detailed in this article, this approach would ignore important Establishment Clause values while embracing a shriveled conception of the Free Exercise Clause.

306 *Id.* at 2319–20; *see also* Newdow v. U.S. Congress, 328 F.3d 466, 471, 477–79 (9th Cir. 2003) (O'Scainnlain, J., dissenting from denial of hearing en banc) (making a similar argument that the pledge is patriotic and not religious), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

307 *Elk Grove*, 124 S. Ct. at 2319 (Rehnquist, C.J., concurring) (*quoting* H.R. REP. No. 83–1693 (1954)).

308 *Id.* at 2317 (Rehnquist, C.J., concurring).

claims. Why it would violate the Establishment Clause to encourage prayer, but would not violate the Establishment Clause to encourage a pledge embracing a theological perspective is not on display in the Rehnquist opinion. Nor does he offer any reason to support the view that the law contains two fixed categories that cannot overlap: the patriotic and the religious. On his own analysis, the Pledge seems to be *both* a patriotic and a religious exercise fused together.

Justice O'Connor's concurring opinion is more elaborate on the claim that religion is not present, but is equally unpersuasive. Her main line of argument focuses on whether the "reasonable observer" would think that the Pledge was religious.[309] This reasonable observer is "deemed aware of the history of the conduct in question and must understand its place in our Nation's cultural landscape."[310] Of course, children, including the children of atheists, agnostics, and Buddhists to name a few, are quite unlikely to be aware of this history or the Pledge's "place." Assuming their views match their parents, they are overwhelmingly likely to think that they are "outsiders, not full members of the political community,"[311] and they would regrettably be right to think so. But, on Justice O'Connor's rendition of the Establishment Clause these children's reasonable reactions are of no moment. In other words, she has formulated a test that can achieve equality for a group of elite insiders, not for American parents and children. This, she maintains, is prompted by the "dizzying religious heterogeneity of our Nation."[312] The alternative she suggests is anarchistic subjectivity threatening nearly every government action.[313] In support of this claim, one might conjure up the fundamentalist who maintains that the public school curriculum establishes a religion because it does not mention God. As I argue *infra*, there is a solution to that problem, and it does not require imaginary people with insider information.[314]

Let us suppose, however, that we are stuck with the O'Connor test. Does it follow that the Pledge is not religious? Justice O'Connor says yes because the Pledge is used for secular purposes,[315] has not engendered significant national controversy,[316] does not involve worship or prayer,[317] and is a minimal part of the Pledge.[318] The notion

309 *Id.* at 2321–22 (O'Connor, J., concurring).
310 *Id.* at 2322 (O'Connor, J., concurring).
311 Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).
312 *Elk Grove*, 124 S. Ct. at 2321 (O'Connor, J., concurring).
313 *Id.*
314 *See infra* notes 359–66 and accompanying text.
315 *Elk Grove*, 124 S. Ct. at 2323, 2325 (O'Connor, J., concurring).
316 *Id.* at 2323–24 (O'Connor, J., concurring).
317 *Id.* at 2324–25 (O'Connor, J., concurring).
318 *Id.* at 2326 (O'Connor, J., concurring).

of using religious language for secular purposes ought itself to raise constitutional eyebrows. Religion is already damaged by using it for secular purposes; the damage is compounded by denying that religion is not involved. And it is a non sequitor to say that reasonable observers would think that they were not outsiders because a religion they oppose was only used to consolidate secular objectives. On the other hand, even from a secular perspective, one might imagine the honoring of the Puritan contribution of democratic thought or of Martin Luther King and the role religion played in his life as a part of recognizing the role of religion in American life. Such honoring would be quite different than the use of God in the Pledge of Allegiance unless one indulges the fiction that it exists only to recall a historical "fact" about the founding of the Republic.

Justice O'Connor argues that the absence of litigation over the last half century and the absence of public controversy shows that the reasonable observer would recognize that the Pledge is secular.[319] I would think it shows the contrary. I would think it shows that atheists, agnostics, and Buddhists knew they were outsiders and knew they had no chance of winning a lawsuit. It is hard to imagine that atheists, agnostics, and Buddhists have been happy to send their children to schools that sport the Pledge. That they have not set themselves up as targets for reprisals and have instead quietly accepted a public insult does not infuse the Pledge with a secular character.

Justice O'Connor also finds it significant that the Pledge is not a prayer.[320] To prove this, she would have the reasonable observer consult the California Education Code to determine that the Pledge is characterized as a patriotic exercise[321] and also notice that the Pledge is led by a teacher rather than a religious leader.[322] Fair enough. But then she walks into outer darkness.

She insists that the constant repetition of the Pledge in a patriotic context has removed religion from the Pledge: "[A]ny religious freight the words may have been meant to carry originally has long since been lost."[323] Similarly, Justice Brennan once wrote that the phrase "In God We Trust" on coins had lost religious meaning.[324] I have always thought that such an argument was ironic. When govern-

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319 *Id.* at 2323–24 (O'Connor, J., concurring).

320 *Id.* at 2324–25 (O'Connor, J., concurring).

321 *Id.* at 2325 (O'Connor, J., concurring).

322 *Id.* (O'Connor, J., concurring).

323 *Id.* (O'Connor, J., concurring).

324 This argument is even less persuasive when used to support the governmentally sponsored ceremonies featuring prayer in the wake of the September 11th tragedy. For the argument that governmentally sponsored prayers should be immune from constitutional objection in exceptional circumstances—such as a national crisis combined with public mourning—so long as the government response occurs within a limited time period from the date of the tragedy, see William P. Marshall, *The Limits of Secularism: Public Relig-*

ment puts a prayer on a coin, it cheapens the prayer. When government makes Christmas a commercial holiday by cooperating with merchants in putting Christmas lights all over town, it cheapens Christmas. And when I hear the phrase "under God" in the Pledge of Allegiance, I think of cynical and sanctimonious politicians currying favor with their constituents.

Perhaps Justice O'Connor means to suggest that the Pledge does not instill religious values. If that is what she means to say, I am inclined to agree. There are grounds to wonder whether significant numbers of children have become religious or stayed religious longer because they mouthed the magic words on school day mornings. It seems unlikely that brief ceremonies of that character have any significant religious influence.[325] Indeed, in the nineteenth century religious promotion was far more conspicuous in the public schools than it is today.[326] Yet many argued that the effort was ineffective. Indeed my colleague R. Laurence Moore strongly argues that the "importance of religion to intellectual development in the nineteenth century had almost nothing to do with what happened in public school classrooms."[327]

But neither this, nor the fact that the Pledge fails to induce spiritual attitudes,[328] nor the fact that the reference to God is circumscribed,[329] or that it is only two of the Pledge's 31 words[330] in any way makes the "under God" phrase nonreligious. Citizens may have forgotten that the City of Los Angeles has a religious meaning, hut any English speaker knows that "under God" and "In God We Trust" carry theological meaning. Indeed, Justice O'Connor states that the phrase is "merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority."[331] I am not sure why individuals are not subject to

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ious Expression in Moments of National Crisis and Tragedy, 78 NOTRE DAME L. REV. 11, 31–33 (2002).

325 Despite ceremonial deists' claims to the contrary, the brevity of the ceremonies and their likely ineffectiveness do not rob them of their religious character.

326 Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY, *supra* note 99, at 40, 45 ("[T]he great apostle of the public school, Horace Mann, . . . continually emphasized that only through public education could a Christian social consciousness and a Christian morality be inculcated in the population as a whole.").

327 R. Laurence Moore, *Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education*, 86 J. OF AM. HIST. 1581, 1598 (2000). For arguments that the Pledge may have more importance in inculcating religious values than I recognize, see Seana Shiffrin, *supra* note 94.

328 *Elk Grove*, 124 S. Ct. at 2324–25 (O'Connor, J., concurring).

329 *Id.* at 2327 (O'Connor, J., concurring).

330 *Id.* at 2326 (O'Connor, J., concurring).

331 *Id.* at 2325 (O'Connor, J., concurring).

divine authority if the United States is, but I am sure that a pledge identifying the United States as subject to divine authority is asserting the existence and authority of the divine.

Justice O'Connor may be suggesting that even if there is some minimal religious content, it is basically non-controversial, and, therefore, not an endorsement. But Justice O'Connor knows this to be false. It is not clear why atheists and agnostics do not matter in her analysis, but she does respond to the contention that Buddhism is not based on belief in a separate Supreme Being: "[O]ne would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation."[332] True, but it is no more satisfying to be told that the Pledge is not an endorsement than it is to be told that it is not religious.

Nor does it work to suppose that the God amendment represents a trivial conflict with Establishment Clause values. As I have just discussed, one cannot persuasively claim that it is bereft of religious meaning. Rehnquist and O'Connor aside, the history leading to the adoption of "under God" makes its religious purpose clear.[333] Moreover, the firestorm following the Ninth Circuit's opinion itself demonstrated the religious character of the message and the tenacity with which it is held.[334] To claim that it is just a patriotic ceremony is to blink that the ceremony was converted into a patriotic/religious ceremony by the God amendment. To claim that the God amendment is de minimis tells those who are marked as outsiders to pretend that they are not marked as outsiders. In contrast, the ideal of those who oppose the insertion of under God in the Pledge of Allegiance is one of equal citizenship. Their constitutional vision sees a nation in which one's religion or lack of religion has no bearing on one's identity as an American citizen.

But, unfortunately, they see a nation that does not exist. It never has, and it never will. Certainly, government has been deeply involved in promoting religion over nonreligion over the course of American history, and, for the greater part of that history, it has supported Protestantism over other forms of religion.[335] The public schools were

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332 *Id.* at 2326 (O'Connor, J., concurring).

333 Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1873–80 (2003).

334 *See id.* at 1914–16. Similar considerations lead me to conclude that "In God We Trust" on coins is not de minimis.

335 James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY, *supra* note 99, at 54, 55 ("While no one Protestant denomination enjoyed the patronage of the state, the cause of a 'pan-Protestantism' had a substantial, if unofficial, governmental endorsement. The consequence was the restriction of the full civil liberties of other, non-Protestant communities of belief."); *see also* Berg, *supra* note

formed in large part to support Protestant values.[336] Indeed, for most of our history, reading from the Bible in the public schools was considered constitutional[337] at the same time that financial aid to private schools was considered unconstitutional.[338] Perhaps some fine mind can reconcile these two positions on the hasis of some neutral principle, but the fact is that the reading was from a Protestant Bible unaccompanied by commentary,[339] and the private schools were largely Catholic. Supporting the Protestants was considered neutral, common sense promotion of morals; supporting the Catholics was establishing a religion.[340]

Although the Court, in the landmark case of *Everson v. Board of Education*, said that "[n]either a state nor the Federal Government . . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another,"[341] it is hard to take this language seriously. This is a country in which "In God We Trust" appears on the currency, the Supreme Court begins its sessions with "God save the United States and this Honorable Court," and Congress has ordained a National Day of Prayer. In theory, of course, these and other practices could be rolled back.[342] In practice, it is inconceivable that they will.[343] Moreover, pretending they are not religious is simply insulting.

179, at 1612 (discussing the American authorities preferences for "generic Protestantism" even after disestablishment); *cf.* TOCQUEVILLE, *supra* note 234, at 293 (

> For the Americans the ideas of Christianity and liberty are so completely mingled that it is almost impossible to get them to conceive of the one without the other; it is not a question with them of sterile beliefs bequeathed by the past and vegetating rather than living in the depths of the soul.

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336 FINKE & STARK, *supra* note 195, at 139–40; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1120–22 (1995); McConnell, *supra* note 78, at 121.

337 *See* Michael deHaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219, 223–37 (2002).

338 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 967 (Walter Carrington ed., 8th ed. 1927); *see* Steven K. Green, *Private School Vouchers and the Confusion over "Direct" Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47, 50–51 (2000) (describing how, from the second half of the Nineteenth Century into the Twentieth, state courts consistently invalidated financial aid to religious schools).

339 Reading without commentary suggested that it was up to the individual to interpret the scripture, but the Catholic Church taught that its hierarchy was necessary for guidance in the interpretation. *See* MACEDO, *supra* note 165, at 54–59, 64–76 (2000).

340 HAMBURGER, *supra* note 172, at 364–65. For the contention, somewhat exaggerated to my mind, that anti-Catholic prejudice remains common, see PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE (2003).

341 330 U.S. 1, 15 (1947).

342 For criticism of the Court's expansion of such practices by resort to analogy, see Van Alstyne, *supra* note 127, at 782–87.

343 For arguments that they should be eliminated, see Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2173–74 (1996); Douglas Lay-

What does this hard reality mean for Establishment Clause interpretation? It seems inescapable that the Establishment Clause should be interpreted in light of precedent along with the values of the American people, that the high wall between church and state perspective should be respected as a regulatory ideal, and that when these clash the Justices should come as close to the ideal as our evolving traditions permit. From that perspective, it seems clear that generalized governmental endorsements of monotheism are consistent with the Establishment Clause. It seems clear that, despite all the lip service to equality, the United States Constitution is best interpreted to be consistent with monotheistic ceremonial prayers that do not involve coercion. Indeed, Justice Douglas was on to something when he said that our institutions presuppose a divine being.[344] Now, of course, it need not be that way. Indeed, given the pluralistic character of our people, it seems to me that we would have a better Constitution if we did not have what amounts to a monotheistic established religion, and it should be noted a monotheism of a specific type—one that, among other things,[345] puts "in God we trust" on the coins, not "in Allah we trust."[346]

Of course, we need not be bound by the dead hand of the past. Of course, we should remember that it is *a Constitution* we are interpreting, one designed for ages to come and to be adapted to varying

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cock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1054–60 (1986).

344 For defense of the notion that America has a civil religion that includes God, see Rohert N. Bellah, *Civil Religion in America*, *in* RELIGION IN AMERICA 3, 5 (William G. McLoughlin & Robert N. Bellah eds., 1966): "[T]he separation of church and state has not denied the political realm a religious dimension." More generally, the Bill of Rights might be understood to presuppose a Supreme Being. For an argument that the notion of equality among human beings cannot be supported without resort to such a conception, see JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT (2002). Although there is a strong case for the proposition that religion has on balance been a progressive force in American politics, see Shiffrin, *supra* note 100, at 1648–52, I do not believe it follows that religion has been a progressive force when employed by American politicians. Particularly problematic has been the theme that God has a "special concern for America." Bellah, *supra*, at 9. The notion that God has sanctioned our colonizing efforts in the name of democracy, let alone in the name of God, is plainly distasteful.

345 Michael Perry suggests that America follows a moderate version of the nonestablishment norm that includes a loving, judging God and that we are all sacred because God created us and loves us. Perry, *supra* note 86, at 309–10. He states that government may affirm these views, but may not impose them on others. *Id.*

346 I do not mean to suggest that Muslims suppose that Allah is a different God than that worshiped by Jews and Christians. Even if the equivalence were generally understood, however, the cultural importance of saying "In God We Trust" instead of "In Allah We Trust" would remain formidable.

conditions.[347] We, however, have also been counseled to recognize that it is *this* Constitution we are interpreting,[348] and *this* Constitution cannot plausibly be understood to foreclose the engraving of "In God We Trust" on coins and the like.[349] At least, not yet; and probably, not ever.

How does this apply to the issues put forward by the Pledge? On this analysis, Congress could legitimately put forth a model as to how citizens might honor the flag if they wished.[350] On the other hand, the use of the Pledge in public school classrooms should not be defended. If the Court could strike down prayer and Bible readings in public school classrooms, it is a short step for it to recognize that encouraging public recitations of the existence of God by children in public school classrooms is not consistent with the Establishment Clause.[351] If the Court could hold that prayers in graduation ceremonies were coercive in that members of the audience might feel compelled to stand, as it did in *Lee v. Weisman*,[352] how much more coercive is the daily recitation of the Pledge in public school classrooms?[353] There is plenty of room under this Constitution to hold that the coercive atmosphere of peer groups in public school classrooms cannot constitutionally function to induce recitals of belief in God.

There is a strong case for an alternative path to the conclusion I have set out, but I do not believe it is ultimately persuasive. This alternative path strives to be pragmatic. It would suggest that Justices should make decisions on the basis of what would best protect religious liberty overall. To declare unconstitutional the engraving of "In

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347 McCulloch v. Maryland, 17 U.S. 316, 408 (1819) ("[W]e must never forget, that it is a *constitution* we are expounding.").

348 WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 6–7 (1984).

349 Similarly, the weight of history suggests the already-established cities of Los Angeles and St. Paul do not violate the Establishment Clause, though these names should not act as precedent for new names of governmental entities.

350 Judge Goodwin's revised opinion in *Newdow* does not maintain that the Congressional amendment is unconstitutional, but it does invalidate the school district's policy of having the pledge recited in the classroom. Newdow v. U.S. Congress, 328 F.3d 466, 489–90 (9th Cir. 2003), *rev'd sub nom.*, Elk Grove Unified Sch. Dist. V. Newdow, 124 S. Ct. 2301 (2004).

351 In truth, the worst aspect of the Pledge's content is not the under God phrase—though it is an outrage. The worst aspect is that we place pressure on small children to repeat words saying that we live in a country with liberty and justice for all. This lie is not cured by the assertion that the Pledge really means that we bave an *ideal* of liberty and justice for all. Does anybody believe that little third graders make this distinction?

Finally, there is a strong First Amendment case for the proposition that forcing school children to make a pledge is an unconstitutional method of instilling values. *See* Seana Shiffrin, *supra* note 94.

352 505 U.S. 577, 598–99 (1992).

353 *Cf.* Gey, *supra* note 333, at 1893–97 (suggesting even more coercion in the Pledge atmosphere than at a football game or graduation, because the student who opts out will be tainted not only as unreligious, but also unpatriotic).

God We Trust" on coins under this approach would be thought futile because it would trigger a quick constitutional amendment to the contrary.[354] Moreover, it would be dangerous. Aside from the symbolic damage created by amending the Bill of Rights, there is no assurance that a new amendment would be narrowly crafted or that it would be narrowly interpreted.

Certainly, one argument for a pragmatic path would be that it has more integrity than pretending that monotheistic ceremonies do not violate equality, or are not really religious, or that the public affirmations of and prayer to a deity are trivial.[355] On the other hand, one might object to this approach on the ground that it sacrifices minority rights on the altar of the intense majority, and so it does, but only when thought to be necessary. One might also object that the Court sacrifices its reputation as a court of law when it resorts to pragmatism. But this would not be the first time that the Court's constitutional decisions have been influenced by pragmatic assessments of its own power. Indeed, if concern about the Court's reputation as a legal actor were primary, a decision finding "under God" constitutional would be mandatory given the swift condemnation that greeted the Ninth Circuit Court of Appeals when it invalidated the Pledge.

But some might argue that this, too, misses the point. The point is not the Court's reputation, but the fact that the Court is supposed to be a legal institution immune from political pressure. The Constitution, on this understanding, requires that the Court interpret the Establishment Clause according to the high wall understanding even if the reading is contrary to our history, even if the reading would swiftly be circumvented by a constitutional amendment that might make matters even worse, and even if the reading would do great damage to the Court as an institution. To that high-minded objection, I plead guilty. I do not believe that vague slogans or deep analysis of the "rule of law" yield the result that Justices are required to render decisions that threaten to undermine critical constitutional values and institutions.[356]

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354 *Cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 54 (2001) (Justices otherwise most committed to strict separation of church and state apprehend that judicial rejection of those entrenched practices [such as 'In God We Trust' on coins and 'Under God' in the Pledge] would engender widespread anger and resentment—and perhaps not unreasonably so (even if not rightly) in light of historical understandings of what the Establishment Clause permits.

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355 *See* Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1317 (arguing that nonreligious explanations are disingenuous and offensive).

356 For the claim that it would be wrong to deny a constitutional right in order to protect the Court, but that the "under God" practice and the "In God We Trust" practice

My concern about the pragmatic approach is pragmatic. I fear that if such an approach were legitimized in defining rights (as opposed to implementation of the "passive virtues"), the Court would not be as aggressive as it should be. It is not clear that a Court armed with pragmatic concerns would have had the nerve to desegregate schools, outlaw prayer in schools, or recognize the burning of flags to be protected freedom of speech. Despite exceptional appointments, the process of appointing Justices is not calculated to produce those who are vigilant in supporting civil liberties. Offering a pragmatic excuse to enforce civil liberties strikes me as a political mistake.

It could, for example, lead to upholding the Pledge in classrooms. To be sure, the prospect of a constitutional amendment in this situation is not as sure as it would be if the Court invalidated "In God We Trust" on coins. After all, Governor Jesse Ventura vetoed a bill that would have required the Pledge to be used in all Minnesota public school classrooms,[357] and only half the states have any such requirement. One could argue that the American people may have no patience for removing "In God We Trust" from coins and the like, but doubt that there is enough of a consensus to underwrite a constitutional amendment requiring the Pledge in American classrooms. On this analysis, protecting the religious liberty of third graders might fall victim to political demagogues, but it is a stronger cause than flailing against inequalities like engraving "In God We Trust" on coins.

Nonetheless, the political risks are substantial. Obviously, government could function quite effectively without parading religious symbols in a ceremonial way. The intense desire to use these symbols may just show that Americans are a religious people who believe that prayer or the recognition of religion is an important part of public life. There is a lot of that involved. But I am sure there is something else, too, and it is revealed by the intensity of the outrage responding to the suggestion that the Pledge of Allegiance presents a problem. There is a desire on the part of many to marginalize those who do not agree, to show who the insiders are, and to send a loud, clear message as to who the outsiders are.[358] And thus a pledge purportedly de-

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can be defended as a part of the historical understanding, see Fallon, *supra* note 354, at 55. *See generally* DWORKIN, *supra* note 47 (opposing strategic conceptions of rights).

357 "My position is that it isn't government's job to mandate patriotism. To me mandating a pledge of allegiance to a government is something Saddam Hussein would do." David Wallis, *Questions for Jesse Ventura: Still Wrestling With it*, N.Y. TIMES MAGAZINE, Aug. 18, 2002, at 11. On the other hand, Michael Dukakis's decision to veto a similar bill in Massachusetts certainly did not help his Presidential campaign. Gey, *supra* note 333, at 1868.

358 *See* Berg, *supra* note 179, at 1612 ("[S]ome Americans repeat the pattern of ignoring or underestimating the harm done to dissenters from explicit government advancement of particular religious truths. For example, it is fair to say, as does Professor Douglas Laycock, that many of those who advocate government-initiated displays and rituals, when they could use nongovernmental outlets for such expression, simply 'place little or no

signed to unite a People divides a People into the "good guys" and the "bad guys." The risk that politicians would pander to these currents might be too much for a pragmatist to swallow.[359]

If the use of the pragmatic consideration would enhance civil liberties, I would not hesitate to endorse it, but judges are already too cautious. In the case of the Pledge, it could cause judges to consign our children to religious coercion in the classrooms even if they believed it was unconstitutional. That is too much of a price to pay.

b. *Contradicting Religious Doctrine*

Government frequently speaks and acts in ways that contradict religious doctrine, and these communications and actions have not been thought to violate the Establishment Clause. Indeed, the Constitution allows governments to contradict doctrines of the Quakers, the Roman Catholics, the Christian Fundamentalists, the Muslims, and the Jews. The military is not unconstitutional despite the Quakers; capital punishment is not unconstitutional despite the Roman Catholics; state teaching about gender roles and homosexuality in ways that contradict the teacbings of Muslims, Christian fundamentalists, and other religions is not unconstitutional; state support of medical care is not unconstitutional despite the Christian Scientists; and public high school Friday night football games do not violate the Constitution despite the Jews.

One could attack parts of this list. The Friday football game example to me shows the unthinking hegemony of Christianity, but attempting to change it would trigger enormous anti-Semitism. In many circumstances, it should be permissible to excuse children from objectionable instruction though this is very different from abandoning the instruction altogether. Capital punishment should probably be unconstitutional on other grounds.[360]

Nonetheless, such government policies raise troubling theoretical issues. Christian fundamentalists faced with a secular school system ask why they are not the kind of outsiders who should be protected

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value on the costs to religious minorities.'"); Berg, *supra* note 3, at 190 ("The separationist approach . . . relied implicitly on the existence of a general religious and moral consensus that made specific references to God seem less necessary; as that moral consensus has broken down, more citizens feel the need to reassert the religious foundations of morality explicitly . . . ."); *cf.* Van Alstyne, *supra* note 127, at 787 (stating that the use by government of religious symbols such as the crèche "are disappointing reminders that religious ethnocentrism, as well as religious insensitivity, are still with us. I do not know whether Mr. Jefferson would have been surprised, but I believe he would have been disappointed").

359 *See* Berg, *supra* note 3, at 190.

360 Numerous Justices have lodged constitutional objections, but they have never been able to deliver a knockout blow. JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 511–37 (9th ed. 2001).

under the Establishment Clause.[361] When Fundamentalists believe that God created the world in seven days, why isn't the teaching of evolution an establishment of religion? Surely Fundamentalists rightly believe that the majority is treating them as outsiders.

One response to the Fundamentalists is that government could not effectively function if it were forced to avoid contradicting religious doctrine in its communications and actions. Indeed, in a pluralistic society it may often be impossible to act without contradicting one religious doctrine or another. For religions divide upon how governments should be organized and how the church should relate to the state; any organizing action will contradict some religion. Nonetheless, it is not clear this shows that in every case government must be permitted to contradict religious doctrine. Perhaps permitting religious claims on this basis would overwhelm government and the courts, but the empirical foundation for that claim depends upon the process for adjudicating the claims and the degree of scrutiny applied.

A more fundamental response to the Fundamentalists is that the Establishment Clause prohibits the establishment of *religion* and the teaching of evolution is not the teaching of religion. A central message of the Establishment Clause is that government has no jurisdiction to determine what God has to say about any subject[362] or to

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361 The question I am posing might be presented by a taxpayer in a school district, even if the objector had no children in the school. The issue raised by the taxpayer would be whether public education in its present form violates the Establishment Clause. If a child were present in the school and she were exposed to instruction that contradicted her religion, then a free exercise issue would also be presented. Ordinarily, in my view, the free exercise claim should prevail. But I see no room for compromise if parents insist on separating their cbild from other children on grounds of intolerance or depriving their child of vital information or critical thinking skills—skills necessary for democratic citizenship and for adaptahility in a changing marketplace. Discussion of the general free exercise issue primarily focuses on the *Mozert* litigation culminating in *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987). For analysis of *Mozert*, see STEPHEN BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS 233–302 (1993) and Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

362 OWEN, *supra* note 85, at 129, 168; *cf.* Sullivan, *supra* note 104, at 198–99 (arguing that the Establishment Clause creates secular governance of public affairs). I think Sullivan leaves too little room for religious speech in democratic life, but whatever secular governance may mean, it must exclude governmental determinations of what God has to say. Consider Laycock, *supra* note 343, at 7–8 (

> "Agnostic" is the label that comes closest to describing the attitude required of the government, but that label is misleading in an important way. An agnostic has no opinion on whether God exists, and neither should the government. But an agnostic also believes that humans are incapable of knowing whether God exists. If the government believed that, it would prefer agnostics over theists and atheists . . . . Agnostics have no opinion for epistemological reasons; the government must have no opinion because it is not the government's role to have an opinion.

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"measure religious truth."[363] The teaching of evolution does not violate this precept. Indeed, a teacher of evolution in the public schools might believe that the best scientific evidence pointed to the truth of evolution, that the Bible pointed in the other direction, and that the Bible was right. The teacher also might think that it is her job to teach science, not religion. From this perspective, the teacher or the school has taken no position on the interpretation of the Bible or the weight to be given to it.

Imagine how different it would be if the science teacher taught the science of evolution and proceeded to say, "And this shows that the Fundamentalists are wrong." Clearly she would have left the realm of science and entered the realm of religion. Despite the example of monotheistic prayers, in the overwhelming majority of cases, when government speaks or acts it does so for civic reasons, not because God has something to say about the subject. Such actions do not deny the existence of God or suggest that God has nothing to say about evolution or any other subject. Despite the fact that Fundamentalists reasonably experience the teaching of evolution as a contradiction of their religious views, such teaching is not religious within the meaning of the Establishment Clause.[364]

These arguments are hardly satisfying to Fundamentalists. But what is the alternative? Should public school teachers teach what God has to say about evolution and other subjects? Should school board meetings resolve the question of God's word or whether there is a God? There may be a compromise to some of these questions. I see no reason why public school teachers should be disabled from teaching that various religions question the views that are being expressed in the classroom—whether those views involve evolution, the legitimacy of war, capital punishment, abortion, or what-have-you. Nothing in the Constitution has been interpreted to prevent teachers from talking about religion. Students need not be deprived of information about strongly held views. Indeed, I would argue that fairness demands that students be provided with this information. Without suggesting that judges should police this aspect of education, I would maintain that this dimension of fairness could ground a constitutional obligation to include such material in the curriculum. Public school authorities, who take oaths to defend the Constitution, may take on constitutional obligations that are rightly regarded as judicially unenforceable.

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363 TRIBE, *supra* note 6, at 1232. As I have suggested, monotheistic affirmations such as those appearing on the coins are limited exceptions to this principle.

364 Shiffrin, *supra* note 304, at 726–27. *But cf.* Steven D. Smith, Barnette*'s Big Blunder*, 78 CHI.-KENT L. REV. 625 (2003) (arguing that there is no meaningful way to draw such distinctions).

The ultimate Fundamentalist position ranges far beyond examples like evolution. From their perspective, the failure to teach religion in the public schools violates the religious rights of many religious believers because they believe that religion should permeate the educational process. From their perspective, the failure to advocate religious beliefs is itself a religious position.[365] The difficulty with this argument is apparent. Religion permeating education in the public schools would clearly violate the Establishment Clause. To close down the public schools in order to accommodate the religious beliefs of some would also violate the religious beliefs of others. However church-state relations might be structured, the religious beliefs of many millions of Americans will be contradicted.[366]

c. *Removing Obstacles from Religious Practice*

Government frequently removes obstacles from religious practice. For example, many states make exemptions to their drug laws to permit Native Americans to ingest peyote at religious services. The *Smith* Court stated that legislative exemptions of this sort were not constitutionally required, but were constitutionally permitted.[367] This obviously favors religious peyote users over nonreligious users. But, for reasons I have canvassed earlier, preferences of this type seem reasonable.[368]

More complicated in terms of analysis are provisions like the federal draft law that exempted those who were conscientiously opposed to *all* wars "by reason of religious training and belief."[369] This, too, favored religious objectors over nonreligious objectors and raises no new issues in that respect, but it favored some religious objectors over other religious objectors, and that should rarely be countenanced.

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365 *Cf.* Richard A. Baer, Jr., *The Epicycles of the Church-State Debate*, CORNELL DAILY SUN, Apr. 12, 2004, at 5, col. 4 (maintaining, as "Orthodox Christian, that whenever it addresses the "Big Questions," such as who we are, how we should live, and the meaning of life, "the secular must itself be considered a form of religion"), , available at http://www.cornellsun.com/vnews/display.v/ART/2004/04/12/407a0c0f898f3?in_archive=1.

366 Mark V. Tushnet, *Disaggregating "Church" and "Culture,"* 42 DEPAUL L. REV. 235, 239 (1992) ("In a religiously pluralist society, *any* particular pattern will constitute an endorsement of the normative stance of some churches and a rejection of the stance of others. Therefore, the only way to devise proper First Amendment jurisprudence is to determine which pattern is normatively desirable.").

367 For strong arguments in favor of legislative accommodation, see Berg, *supra* note 1, at 476–83 which examines textual, structural, and normative arguments, as well as views of original understanding and case law precedent, that support accommodating religious conscience), and Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

368 One might argue that if *Smith* was rightly decided, Establishment Clause problems are more formidable because religious actors are favored over nonreligious actors in circumstances that are not required under the Free Exercise clause.

369 50 U.S.C. app. § 456(j) (2000).

The Court maintained that determining the sincerity of those who object to all wars would generally be easier than determining the religious sincerity of those who object only to particular wars.[370] True enough. But when serious liberty values (forcing someone to kill when their religion commands otherwise) and fundamental equality values (favoring one group of religions over others) combine in the same case, more serious justification needs to be offered. It has also been suggested that permitting such general conscientious objection opportunities would compromise the government's ability to raise the kind of fighting force it needs.[371] If one takes a democratic perspective, the desire of elites to fight a war lacking strong democratic support should undercut the importance of the governmental interest. If the interest is sufficiently grave, a democratic perspective would suggest a less restrictive alternative: justify the war effort to the people.

A final objection to permitting conscientious objection is that it does not just remove obstacles to religious practice; it offers powerful incentives for people to join a religion.[372] I do not doubt the psychology that lies behind this argument. I believe that many persons joined the Quakers in an effort to avoid the Vietnam War. These side effects, however unintended, are offensive to the values of the religion clauses. But violating liberty and equality values in such a severe way by not allowing conscientious objection seems even more problematic.[373]

Commentators such as Ira Lupu have powerfully argued that permitting discretionary accommodation risks discrimination against minority religions.[374] But one intriguing feature about the conscientious objector example is that the statute favored minority religions like the Quakers over more powerful religious constituencies such as the Catholics and mainline Protestants. A partial answer to Lupu's worries is that courts should extend the benefits of legislation intended to protect religion to minority religious groups.

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370 *See* Gillette v. United States, 401 U.S. 437, 460 (1970).

371 *See id.*

372 *See* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 698–700 (1980); *cf.* Berg, *supra* note 1, at 463 (arguing that the real issue with regard to religion-specific accommodations is whether "its greater effect [is] to permit religious practice to continue freely, or to induce people to switch to the accommodated religion"). Permitting the use of peyote for religious purposes is not a problematic accommodation. *See supra* notes 107–08, 367 and accompanying text.

373 My contention, therefore, is that religious exemptions in this context should be constitutionally required. For the suggestion that such exemptions should be permitted, but not required, see McConnell, *supra* note 367, at 702.

374 Lupu, *supra* note 5, at 586.

Another concern frequently raised about such accommodation provisions is that they impose burdens upon others.[375] For example, *Estate of Thornton v. Caldor*[376] invalidated a Connecticut statute guaranteeing workers an absolute right not to work on the day they observed as the Sabbath.[377] The Court was especially concerned about the sweeping character of the statute, and that it did not permit exceptions when honoring the Sabbath would cause a substantial economic burden on the employer or the imposition of significant burdens on other employees. Too be sure, some burdens in some circumstances could be undue (though it is not clear this was one of them).[378]

Significantly, the *Thornton* Court did not object to the state's concern with the interference with free exercise by private actors.[379] If it had, the religious aspect of Title VII of the 1964 Civil Right Act would have been endangered.[380] To be sure, the Constitution does not protect free exercise against private interference. As Michael McConnell

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375 For consideration of a wide range of circumstances, both religious and nonreligious, in which burdens are imposed upon others because of autonomous choices together with a strong argument for the virtue of supporting such choices, see Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, *in* REASONS AND VALUES 270 (Philip Pettit et al. eds., 2004).

376 472 U.S. 703 (1985).

377 *Id.* at 707–08.

378 Regrettably, the Supreme Court has interpreted Title VII's "reasonable accommodation" of religion requirement to require very little of employers. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (rejecting the proposition that an employer must accept the employee's proposed accommodation unless it would result in undue hardship); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding that an employer need not accommodate an employee whose religious heliefs prevented Saturday work if doing so would cause it to bear more than a de minimis cost).

379 Justice O'Connor, joined by Justice Marshall, thought that permitting persons to take off work on the Sabbath constituted an endorsement of the Sabbath. *See Estate of Thornton*, 472 U.S. at 711 (O'Connor, J., concurring). I do not see why this law endorses religion any more than laws exempting believers from controlled substance laws if they ingest peyote in a religious ceremony. Presumably, the law was passed primarily to support minority religions since the majority of believers would typically have Sunday off. Even if the law helped majority believers exercise their religious liberty, however, the removal of an obstacle to religious practice should not, without more, be considered an endorsement.

380 Mark Tushnet does an admirable job of showing that there can be many hard cases under the accommodation principle, but this demonstration itself does not imperil the project of protecting religious liberty against the actions of private actors altogether. Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1704–08 (1988). Tushnet also argues that accommodation does not easily follow from a republican or pluralist conception of government. *Id.* at 1695–1701. The accommodation strand of religion law seems most closely tied to the liberty value. This presents no problem for actions at the state and local level where officials enjoy general police powers. It could, however, present problems at the federal level since the religion clauses confer no power upon the federal government (except through section five of the Fourteenth Amendment). This could lead to questions of whether Congress can pass legislation under the Commerce Clause for non-commercial reasons. Assuming sufficient commercial reasons were not presented and only a tie to commerce were present, one might wonder why Congress could protect morals under the Mann Act, but not religious practice under acts such as Title VII.

observes, "[t]he legislature should have as much latitude to protect the exercise of religion that it has to protect other important values in life."[381] The state has a substantial interest in protecting its citizens' free exercise of religion just as it has an interest in protecting them in a wide variety of other spheres.

2. *Unacceptable Conformity with Equality: Equality in the Public School Classroom*

If the complexity of the Establishment Clause means that some deviations from formal equality are permissible, it should not be surprising that complying with formal equality is not sufficient in other circumstances. Although conservatives have argued that exceptions should be permitted in favor of religion in particular legislative schemes, they have pressed the view that compliance with formal equality should otherwise be sufficient to meet Establishment Clause standards. Conservatives, for example, have been arguing for many years that school voucher programs should be deemed constitutional under the Establishment Clause so long as the standards for their distribution do not discriminate against religious or nonreligious schools.[382] Thus, the equality theme loomed large when the Court decided the landmark case of *Zelman v. Simmons-Harris*.[383] The case

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381 *Estate of Thornton*, 472 U.S. at 703. *Smith* also seems to make it clear that the removal of burdens on religious activity ordinarily does not violate the Establishment Clause even if the burdens do not violate the Free Exercise Clause. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990); *see also* Gillette v. United States, 401 U.S. 437, 453 (1971) ("Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" (quoting United States v. MacIntosh, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting))). One might argue that permitting the discretionary removal of burdens on free exercise places churches in a position of dependence that could have a chilling effect on their criticism of government. This, for example, has been a historic problem in Mexico. CHAND, *supra* note 186, at 196–203. In Mexico, however, the government denied basic freedoms to those who wished to practice their religion, *see id.* at 156–59, chilling religion more than if the government removed burdens preventing free exercise. *But see id.* at 196 (explaining that the Salinas government removed anticlerical articles from the Mexican constitution in an attempt to contain the growing activism of the Mexican clergy). This makes it all the more important that Free Exercise doctrine err on the side of protecting religious freedom to minimize the chilling effects associated with governmental discretion.

382 *See, e.g.*, Mark E. Chopko, *Vouchers Can Be Constitutional*, 31 CONN. L. REV. 945, 948 (1999) (arguing that broadly based neutral voucher programs meet constitutional requirements); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 366–68 (1999) (arguing that non-discrimination is required).

383 536 U.S. 639 (2002). For criticism of *Zelman*, see Gary J. Simson, *School Vouchers and the Constitution—Permissible, Impermissible, or Required?*, 11 CORNELL J. OF L. & PUB. POL'Y 553, 564–76 (2002); Note, *They Drew a Circle That Shut Me In: The Free Exercise Implications of* Zelman v. Simmons-Harris, 117 HARV. L. REV. 919 (2004) (claiming that the Cleveland system severely impaired free exercise values). *But see* Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 220 (2004) (arguing

forced the Court to consider the constitutionality of Ohio's system of providing funds primarily to poor children to attend private schools. The overwhelming majority of recipient families used the funds to send their children to religious schools.[384] The system presented the Court with a hard choice: either accept substantial intrusions on serious Establishment Clause interests or invalidate an important effort to help poor children enmeshed in a failing urban public school system.

For the Court led by Chief Justice Rehnquist, however, it made no difference that the recipients of Cleveland's largesse were poor, nor did it matter that the public schools were in sorry condition.[385] For the Chief Justice, it was enough that the program was formally neutral with respect to religion[386] and that the choice of which school to attend was a private and independent parental choice, not a decision of the state.[387] As a result of the private choice element, Rehnquist determined that no reasonable observer could believe that religious schools were endorsed by the state.[388] Similarly, Rehnquist found no purpose to advance religion.[389]

Since the Ohio program, at least on its face, was not designed to advance religion over nonreligion or to favor one religion over another, the Court maintained that the program met Establishment Clause standards. As the dissenting Justices observed, this form of analysis is too fast; indeed, it is utterly impoverished. The difficulty is that other Establishment Clause values are in play. Vouchers in Cleveland forced many taxpayers to support religious ideologies that they opposed,[390] had unequal impact, favored one religion in a substantial way,[391] and ignored "the risk that religion can be neutralized, homog-

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that "once vouchers are made available for use at private schools, they must be made available for use at religious schools as well").

384 In fact, 96% of the voucher recipients used vouchers in religious schools. *Zelman*, 536 U.S. at 647.

385 These facts were mentioned in the opinion, *id.* at 644, 657, but they were not relevant to the outcome except to show that Ohio could not reasonably be understood to have the purpose of advancing religion, *id.* at 649–54, or to be endorsing religion, *id.* at 654–55.

386 *Id.* at 653; *see also* Locke v. Davey, 540 U.S. ___, 124 S. Ct. 1307 (2004). In *Locke*, the Court ruled that formal neutrality in post-secondary school aid was not required when the state funded scholarships, but refused to fund studies in devotional theology. The Court observed that the state's interest was not based on hostility toward religion, but rather was to avoid compromising values relating to establishment of religion. *See id.* at 1312–14.

387 *Id.* at 652–53.

388 *Id.* at 654–55.

389 *Id.* at 649–54.

390 Forcing individuals to advance religious views they reject is the "primary vice of government support for private religious schools." Conkle, *General Theory*, *supra* note 6, at 1175.

391 96% of the voucher students attended Catholic schools.

enized, and secularized when it participates in governmental programs . . . ."[392]

The risks of church-state interaction seem particularly acute in this context. Consider that about half of the children who attend private schools are in Catholic schools,[393] and that those schools exist primarily to maintain or to increase the membership of the Church.[394] If vouchers are constitutional, the Church has an interest in using its political power in lobbying to acquire financial aid in the form of vouchers, to maintain their continued existence, and to shape the voucher program in ways that might benefit the Church. Similarly, politicians have an interest in extracting benefits from the Church in return for advocacy with respect to the same issues. This just can't be the kind of relationship between church and state that is appropriate under the Establishment Clause.

Of course, churches have lobbied politicians on issues like poverty, civil rights, the environment, and abortion. The state will inevitably be involved in issues upon which churches take a stand.[395] But church-state negotiations about the money that will go to help churches propagate theological doctrines in their schools seem quite different.[396] Negotiating about state money for proselytizing purposes

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392 Conkle, *supra* note 1, at 22. Berg forcefully argues that churches—not a court—should make the decision whether to compromise and accept government regulation as the cost of getting government funding. Berg, *supra* note 179, at 1635–36. My view is that this argument assumes the churches will make good decisions in this area where the history indicates that Roger Williams and James Madison were on to something, ignores the civic values associated with the checking function of religion and the goal of nurturing civic virtue, and reads an important goal of the Establishment Clause out of the Constitution.

393 The percentage has declined substantially over the years. Catholics peaked at 87% of private school enrollment in 1966 and dropped to 64% in 1982. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 81 (1999).

394 MORRIS, *supra* note 185, at 110–11 (parochial schools established to encourage reception of the sacraments and to prevent mixed marriages).

395 For an expression of concern about the power of religious lobbies from a Madisonian perspective, see Hamilton, *Power*, *supra* note 164, at 816–21 ("[Religion] continues to deserve the mantle of distrust Madison placed upon it."). Though the power of religious lobbies is regrettable in many contexts, I believe that religious lobbying in the U.S. has historically benefited progressive politics. Shiffrin, *supra* note 100, at 1646–52.

396 *Cf.* Daniel O. Conkle, *Does the United States Need an Establishment Clause?: God Loveth Adverbs*, 42 DEPAUL L. REV. 339, 345–46 (1992) (distinguishing between worldly and spiritual matters in terms of the political role of religions); Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 381 (1992) (maintaining that religion will always be part of politics, but theology, worship, and ritual are beyond the scope of government).

involves substantial state intrusion into the domain of religion[397] and improper use of the state for religious ends.[398]

I do not mean to argue that these considerations should necessarily be decisive.[399] Professors Berg and McConnell argue with some force that the rise of the welfare state puts religious institutions in a less powerful position than they enjoyed at the founding and that funding is necessary to assure the conditions of religious freedom.[400] I only mean to suggest here that the Establishment Clause analysis would have been more rich and rigorous if the full range of values had been considered and if the conflicts between Establishment Clause values had been exposed and discussed.[401] What I would like to discuss more fully is what might happen if a school board emboldened by *Zelman* proposed to bring religion into the *public* schools in a formally non-discriminatory way.

Suppose, for example, that a school board thinks it inappropriate to provide nonreligious education without providing religious education. Imagine that it sets a couple of hours per week to permit priests, ministers, rabbis, other religious teachers,[402] and nonreligious humanists[403] to enter the public schools to give religious or nonreligious ethical instruction, that students (with parental permission at earlier ages) are free to enroll in the class of their choice, and that nonreligious electives are available at the same hour.

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397 Although Michael Perry supports the constitutionality of financial aid to religious schools and charities along with nonreligious schools and charities, *see* PERRY, *supra* note 167, at 3–19, he has also observed that "[o]ne way for government to corrupt religion—to co-opt it, to drain it of its prophetic potential—is to seduce religion to get in bed with government; an important way to protect religion, therefore, is to forbid government to get in bed with religion." Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407, 420 (1996).

398 *See* Hamilton, *Pragmatic Balance*, *supra* note 164; Hamilton, *Power*, *supra* note 164.

399 In fact, the majority also underestimates the religious freedom arguments in favor of vouchers. That the government grants a free secular education to students puts religious education at a disadvantage. Some argue that this permits or mandates the existence of vouchers. *See, e.g.*, Berg, *supra* note 32, at 706 ("Excluding religious agencies from public programs . . . produces a regime that favors the secular rather than one that leaves choices up to citizens.").

400 *See* Berg, *supra* note 32, at 714; McConnell, *supra* note 78, at 137, 161, 183–94.

401 Elsewhere I argue that the constitutionality of vouchers should depend on the context. Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503, 550 (2002).

402 I leave to the side the potentially difficult question of how to determine who can qualify as a religious teacher. For example, "70% of the imams in France are self-proclaimed." *Special Report: Muslims in Western Europe: Dim Drums Throbbing in the Hills Half Heard*, ECONOMIST, Aug. 10, 2002, at 21, 23.

403 For a case striking down a school district's program permitting clergy to enter the schools for group counseling about civic values—among other things, on the ground that it favored religion over nonreligion, see Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 287–89, 291–92 (5th Cir. 1999).

A similar arrangement was declared unconstitutional by the Supreme Court in *McCollum v. Board of Education*[404] in 1948, but it might be argued today that the school board was merely rectifying inequality. Notice precisely what would be at stake. It is already permissible to teach *about* religion in the public school curriculum.[405] The Constitution does not require that students be uninformed about the religious diversity of the American people. Schools are free to inform future citizens about the religious values and positions that inform many of the most controverted policy issues in the Republic. Such instruction allows students "to *think other people's thoughts* instead of ignoring them and fearing them (which does not mean thinking *as others do*)."[406] Moreover, there are clear circumstances in which religious proselytizing can take place in the public schools. For example, suppose a public school allows private organizations in the community to use its classrooms in the afternoons after school or other times when school is not in session. If the school is generally open to organizations, religious organizations may not be excluded even if they are engaged in proselytizing.[407] When a limited public forum has been opened, content discrimination is rarely permitted. In such a circumstance, the public school honors freedom of speech; it does not endorse religion.

On the other hand, if a school board in a predominantly Catholic community approves a course in Catholicism taught by a practicing

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404 333 U.S. 203 (1948). The program was applied in grades four through nine with weekly classes of thirty minutes in the lower grades and forty-five minutes in the higher grades. *Id.* at 207–08. The instructors were employed by an interfaith council and were approved and supervised by the superintendent of schools. *Id.* at 208. Only Catholics, Protestants, and Jews participated in the program. *Id.* at 207. In some years there were no Judaism classes. *Id.* at 209.

405 *See generally* Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159 (2002) (arguing among other things, that schools should teach about religion to prepare students to be citizens of a religious world and nation). The school board might argue that arguments are best evaluated by hearing their presentation by true advocates. *Cf.* JOHN STUART MILL, ON LIBERTY 45 (David Spitz ed., W.W. Norton & Co. 1975) (1859) .

406 ÉTIENNE BALIBAR, WE THE PEOPLE OF EUROPE: REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 202 (James Swenson trans., 2004). Thomas Berg maintains that instruction in public schools would inevitably slight some religions at the expense of others. Berg, *supra* note 32, at 745. My view would be that the disadvantage of the deviation from equality is outweighed by the educational interests at stake.

407 *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (holding that a school district was required to permit Christian prayer group to use elementary school facilities when the facilities had been open to nonreligious groups); Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384, 395–97 (1993) (holding that a school district was required to permit a church to use school facilities to show a religious film series when facilities had been open to nonreligious groups). For criticism of permitting religious exercises in the public schools, see Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 187–89 (1986).

Catholic whose goal is to make Catholicism appealing, the arrangement would clearly exceed constitutional bounds. It is not the business of the public schools to endorse Catholicism. The example we are considering involves none of this. It does not endorse a particular religion as in *Allegheny County* and it does not endorse religion over nonreligion. The school board would argue that it just gives religion a fair place at the table.

If formal equality is the sole Establishment Clause value, the Board has a strong case. After all, the arrangement need not favor one religion over another,[408] and it does not favor religion over nonreligion. Moreover, the size or existence of particular religious classes would depend not upon the decision of the state, but the decisions of numerous private actors. On *Zelman*'s logic, no one could reasonably suppose that the state had endorsed any particular religion. Given that alternative nonreligious classes are available, it would be unfair, according to the *Zelman* analysis, to accuse the state of being motivated by a religious purpose.

If *Zelman*'s analysis is correct, the result in *McCullom* is open to question. And perbaps it should be. Public schools in England, Northern Ireland,[409] Spain,[410] Portugal,[411] Italy,[412] Germany,[413] and

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408 There would invariably be non-neutrality of effect, but, at least in theory, the program could be open to those who wish to teach regardless of religious persuasion. *Zelman* produced inequality of effect, but the Court did not find this to be fatal. *See supra* notes 384, 391.

409 FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT, *supra* note 201, at 328–29. In Northern Ireland, the religious curriculum must be taught in those private schools that receive public funds. Catholic schools, the main class in this category, use the mandated religious curriculum, but add to it. *Id.* The state run Protestant schools simply follow the curriculum without systematic additions. *Id.* The Republic of Ireland has no state operated schools at the primary level, but it funds and regulates private schools, the overwhelming majority of which are Catholic schools. *Id.* at 348. A contentious issue in those state funded schools is not whether religion should be taught, but whether religion can be interwoven in the curriculum. *Id.* The concern is that an integrated religious curriculum discriminates against religious objectors who have a right to be excused from religious instruction. *Id.*

410 *Id.* at 384.

411 U.S. Department of State, International Religious Freedom Report 2002, *available at* http://www.state.gov/g/drl/rls/irf/2002/13956.htm (last visited Sept. 20, 2004).

412 U.S. Department of State, International Religious Freedom Report 2002, *available at* http://www.state.gov/g/drl/rls/irf/2002/13941(last visited Sept. 20, 2004).

413 FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT, *supra* note 201, at 309.

Poland[414] typically teach religion.[415] Indeed, in Germany, children have a constitutional right to receive a religious education in the public schools.[416] Perhaps these countries have come to a better reasoned conclusion about the place of religion in the educational process.[417]

Perhaps, but there are substantial grounds for believing otherwise. First, formal equality in this circumstance promises to lead to substantial substantive inequality. Suppose the system is adopted in school districts in Mississippi, Utah, and Minnesota. Classes will be overwhelmingly Southern Baptist in some districts in Mississippi, Mormon in some districts in Utah, and Lutheran in some districts in Minnesota. This inequality in itself is problematic.[418] But suppose such a proposal is enacted in a more heterogeneous district. It might be supposed that such a system could arguably serve an important multicul-

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414 According to the United States State Department:

> Although the Constitution gives parents the right to bring up their children in compliance with their own religious and philosophical beliefs, religious education classes continue to be taugbt in the public schools at public expense. While children are supposed to have the choice between religious instruction and ethics, the Ombudsman's office states that in most schools ethics courses are not offered due to financial constraints. Although Catholic Church representatives teach the vast majority of religious classes in the schools, parents can request religious classes in any of the religions legally registered, including Protestant, Orthodox, and Jewish religious instruction. Such non-Catholic religious instruction exists in practice, although it is not common, and the Ministry of Education pays the instructors. Priests and other instructors receive salaries from the State for teaching religion in public schools, and Catholic Church representatives are included on a commission that determines whether books qualify for school use.

Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, Poland: International Religious Freedom Report, *at* http://www.state.gov/g/drl/rls/irf/2001/5727.htm (last visited Sept. 9, 2004).

415 France is a conspicuous exception to this pattern. Religion is absent from the public schools and the French constitution forbids giving state money to religions for any purpose (though tax benefits are provided to "long-established Christian churches and their Jewish counterparts"). *Special Report: Muslims in Europe*, *supra* note 402, at 23. For many years, the Christian religion was taught in the Ontario public schools, but the Ontario Court of Appeal struck down the practice on the ground that it violated § 2(a) of the Canadian Charter of Rights and Freedoms, guaranteeing freedom of conscience and religion. Corp. of the Can. Civil Liberties Ass'n v. Ontario [1990], 71 O.R. 2d 341. The court argued that the purpose and effect of the practice was to indoctrinate in the Christiau faith and this was not saved by a provision exempting those who did not wish to participate. *Id.*

416 For discussion of the nature and limits of this right, see Ingrid Brunk Wuerth, *Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech*, 31 VAND. J. TRANSNAT'L L. 1127, 1143–58 (1998).

417 *See* Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163 (2002). Fried maintains that the widespread support in foreign countries of private religious schools should be an embarrassment to those who oppose vouchers. *Id.* at 183–84. But, aside from the differences in culture, whether a foreign government's support for religion in public schools or for private religious schools should be considered embarrassing to those who oppose vouchers depends entirely on how well these other countries' arrangements work in practice. The existence of an arrangement is not a demonstration of its sagacity.

418 TRIBE, *supra* note 6, at 1174.

tural purpose. A hallmark of public education is its commitment to educate children of all classes, races, and religions together.[419] This commitment to integrated education fosters autonomy, empathy, creativity and imagination, equality, respect and tolerance, social skills, justice, and democratic education.[420] Having children attend religious classes in the public schools makes it more difficult to paper over difference, and arguably might foster genuine reflection and dialogue about the character of those differences and the extent to which there is unity in those differences. Students who attend to those differences on this line of thought need not abandon their faith tradition, but by empathic engagement with those of other traditions, may learn more about themselves and the traditions of which they are a part.[421]

Nonetheless, there is good reason to worry that segregated religious education in the schools would promote separatism, marginalization, and intolerance. Multicultural goals might better be achieved in the context of teaching about religions generally. In those contexts students are not formally marked out as separate, and dialogue can arise out the experience of subject matter taught to all. The presence of segregated religious education in the schools functions to emphasize difference in a visible way that would seem to lead students away from the recognition of unity in difference. This kind of state involvement is contrary to the goals of public schools and seems contrary to the toleration values embedded in the religion clauses of the First Amendment.

Moreover, the burden of these disadvantages could fall with particular weight on the children whose religions are small minorities in the district. In addition, as previously discussed, there are good reasons to believe that some of the religious teaching in the schools would be contrary to public goals. That is, such teaching might be racist, sexist, homophobic, and more generally intolerant; *e.g.*, we are saved and they are not. The potential for stigmatization and denial of liberty are not inconsiderable.

These concerns are not rescued by substantial state interests. The strongest argument for access of religious leaders sounds in equality.[422] It is sometimes argued that the public schools teach a religion,

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419 This was one of the main goals of the common school movement. MACEDO, *supra* note 165, at 52–54.

420 Shiffrin, *supra* note 401, at 513–23.

421 For reflections about this process, see DAVID TRACY, THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM 405–55 (2002).

422 In the absence of a specific showing, there is no general right of access to the public school curriculum. To be sure, religious leaders may be permitted in the schools in some circumstances. If a public high school permits community groups to use its classroom in the late afternoon, free speech doctrine requires that groups be admitted to this public forum on a content-neutral basis. Lambs Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). Thus, religious groups

namely secular or ethical humanism. If this were true, the argument might continue, equal access for other religions should be required.[423] The difficulty with the argument structured in this fashion is that the premise is simply wrong. The doctrine of secular or ethical humanism, according to this argument, holds that no God exists. God, from this account of the secular humanist, is simply superstition.[424] So understood, it seems clear that no public school in America teaches any such thing. Moreover, the public school bureaucracy, including masses of school teachers, is filled with a substantial portion of religious believers.[425] Indeed, if any school did teach agnosticism or atheism, the Establishment Clause would clearly be violated. The remedy would be an injunction against the teaching, not a requirement of access for those with other views.

A better way of making this argument would be to stress that failing to mention God in the public schools communicates a message of secular humanism[426] and discourages religion.[427] One might argue that the public schools contributed to religious life for most of our history, but the Supreme Court ended all this by excluding prayer from the schools. In support of the view that the public schools discourage religion, one might point to the slow, but steady rise of nonbelievers in the United States.[428] On the other side, the failure to mention God in the public schools can also be seen for what it is: an acceptance of the separation of church and state. Moreover, outside the public school curriculum, religious clubs flourish; moments of silence exist at the outset of classroom days; prayer groups frequently meet before the beginning of school. At the same time God is absent from the public school curriculum, sociologists marvel at the religious

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must he admitted along with nonreligious groups even if the public school maintains that their admission violates the Establishment Clause. *Id.* On the other hand, permitting religious leaders into the schools during class time would be unconstitutional because any such program would not be opened to public groups at large.

423 This argument is ordinarily employed to justify state funding of vouchers to religious schools.

424 Some secular humanists might be agnostic or even might believe that God exists, but would argue that a belief in God is not important for the conduct of life. The public schools also do not advocate these variations of secular humanism.

425 *See* Smith, *supra* notc 85, at 174.

426 Fundamentalist Christians in particular think that this is unfair to them. And this is correct in the sense that the system cannot be justified in terms that any reasonable person would be bound to accept. *See* Fish, *supra* note 36, at 2256, 2257 n.4. On the other hand, if Christian fundamentalists achieved what they want, the system would be unfair to others in exactly the same sense. As Fish states, "[t]he only real question is whether the unfairness is the one we want." *Cf. id.* at 2256. Our choice is to determine which unfair system is better.

427 Hunter, *supra* note 335, at 68–73.

428 As I have already suggested, it is hard to believe that the absence of school prayer could account for this rise. *See supra* note 327 and accompanying text.

character of the American people.[429] There are also grounds to doubt the extent to which the public schools have played a significant role in religious socialization. It is hard to believe, for example, that the existence of a ritualized prayer at the outset of a school day had any substantial spiritual effect.

Indeed, assuming that it is worthwhile for the state to promote religion, one could reasonably wonder how much would be accomplished by the small amount of classroom time involved in such programs. The European experience would suggest not much. Of course, it is all a matter of perspective. Perhaps in Spain religious participation would be even lower if religion were not taught in the public schools; perhaps religiosity in the United States would be even higher if religion were taught in the public schools.

Perspective matters on how many personal conversions count as a success. From the perspective of many religions, every soul counts. Forty conversions might be a success. From the perspective of government, we are supposing that religiosity of the people as a whole matters in a democratic society. From a civic perspective, affecting the views of only forty students would not be worth pursuing. But government has to adopt a civic perspective, not a religious perspective, and from the perspective of public goals, evidence that religion in the schools has substantial effects is hard to come by.[430] There does not seem to be evidence that would outweigh the Establishment Clause concerns.

Perhaps even more to the point, in the end, the issue is not whether children get religious instruction; the issue is whether they get it in the schools. If children do not get religious instruction in the public schools, they can get religious education in their churches, mosques, or temples. Indeed, the Court in *Zorach v. Clauson*[431] upheld released time programs that could, if properly structured, miti-

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429 The thesis that religions will disappear as a society develops is shattered by the American religious demographics. *See supra* note 198–99 and accompanying text. The U.S. experience forces sociologists to recognize that the phenomenon is more complicated.

430 Benjamin Beit-Hallahmi and Michael Argyle's reading of the literature suggests that "[t]he effects of religious education seem to be quite weak, when other variables are taken into account." BEIT-HALLAHMI & ARGYLE, *supra* note 228, at 109. They report greater effects in Catholic schools. *Id.* at 109–11 ("[I]t has been found consistently that going to a Catholic school does have a definite effect on religious beliefs, attitudes, and later church attendance . . . ."). Others argue that the most important religious education occurs in early childhood, and that adopting modern educational assumptions about when instruction should begin causes these religious groups to "neglect the most formative time in children's lives. In a religious community, five or six years of age is rather late for learning the important attitudes and rituals of a religious life." Gabriel Moran, *Religious Education After Vatican II, in* OPEN CATHOLICISM: THE TRADITION AT ITS BEST: ESSAYS IN HONOR OF GERARD S. SLOYAN 151, 154 (David Efroymson & John Raines, eds., 1997).

431 343 U.S. 306 (1952).

gate, but not liquidate, the Establishment Clause concerns. Regrettably, the program upheld in *Zorach* was doubly defective. First, the program in essence suspended the duration of the school day by not holding classes for those who were not released and requiring them to stay in study hall.[432] Justice Jackson characterized this as a "temporary jail for a pupil who will not go to church."[433] Hyperbolic as this may be, the failure to provide elective classes seems to take the program beyond accommodation into using the compulsory machinery of the state to encourage religion.[434] Similarly, the *Zorach* program provided that teachers were to receive written reports from churches to confirm attendance.[435] This, too, seems to cross the line. Excusing students on religious grounds is one thing; using state machinery to enforce religious attendance is quite another.[436] Nonetheless, released time programs not containing the objectionable features of *Zorach* strike me as a reasonable compromise. Although concerns about secular or ethical humanism have been overstated, the underlying equality concern is legitimate. The state is paying students to be educated in a nonreligious way. Accommodation of the equality concern in this manner allows parents to use time for their children for religious education in a religious atmosphere. To be sure, the accommodation may cause some stigmatization, but stigmatization would likely be more serious if the children removed themselves to segregated classrooms on public school premises. Of course, the released time solution is not perfect, but no solution can be perfect when the values of the religion clauses conflict with each other.

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432 *Id.* at 309.

433 *Id.* at 324 (Jackson, J., dissenting).

434 For commentary, see Lupu, *Trouble*, *supra* note 104, at 743–45.

435 343 U.S. at 308.

436 On the other hand, the Court stated that there was no "indication that the public schools enforce attendance at religious schools by punishing absentees from the released time programs for truancy." *Id.* at 311 n.6. It is not clear what the Court thought the attendance reports were to be used for or what effect they had. Justice Jackson opined that, "[t]he greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom." *Id.* at 324 (Jackson, J., dissenting). The Court did conclude that the teacher could appropriately make efforts to confirm that the student was not a truant. *Id.* at 313. Justice Black dissenting maintained that the

> sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids.

Id. at 317 (Black, J., dissenting).

CONCLUSION

The attempt to explain the religion clauses by reducing their support to a small set of values—most commonly equal liberty—is too narrow. The Free Exercise Clause is supported by seven values: (1) it protects liberty and autonomy;[437] (2) it avoids the cruelty of forcing an individual to do what he or she is conscientiously obliged not to do or to penalize an individual for responding to an obligation of conscience;[438] (3) it preserves respect for law and minimizes violence triggered by religious conflict;[439] (4) it combats religious discrimination;[440] (5) it protects associational values;[441] (6) it promotes political community;[442] and (7) it protects the personal and social importance of religion.[443] The failure to appreciate this is not only of theoretical importance, but also of pragmatic importance. If free exercise is too be given its full weight in a constitutional balance, the full range of values needs to be considered.

The attempt to reduce the religion clauses to equal liberty is even less convincing with respect to the Establishment Clause. The Establishment Clause is supported by seven values: (1) it protects religious liberty and autonomy including the protection of taxpayers from being forced to support religious ideologies to which they are opposed;[444] (2) it stands for equal citizenship without regard to religion;[445] (3) it protects against the destabilizing influence of having the polity divided along religious lines;[446] (4) it promotes political community;[447] (5) it protects the autonomy of the state to protect the public interest;[448] (6) it protects churches from the corrupting influences of the state;[449] and (7) it promotes religion in the private sphere.[450]

The attempt to reduce the Establishment Clause to equal liberty works well in a case in which the government appropriates religious symbols to celebrate Christmas as it did in *County of Allegheny*. Moreover, the liberty value explains why government sponsored prayer does not belong in the schools, and it can explain why government can

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437 *See supra* Part I.D.1.
438 *See supra* Part I.D.2.
439 *See supra* Part I.D.3.
440 *See supra* Part I.D.4.
441 *See supra* Part I.D.5.
442 *See supra* Part I.D.6.
443 *See supra* Part I.D.7.
444 *See supra* Part II.B.1.
445 *See supra* Part II.B.2.
446 *See supra* Part II.B.3.
447 *See supra* Part II.B.4.
448 *See supra* Part II.B.5.
449 *See supra* Part II.B.6.
450 *See supra* Part II.B.7.

prevent impingement of free exercise by private employers. But the values of equality and liberty do not help in explaining why it is permissible to put "In God We Trust" on coins. They do not explain why government can engage in action that contradicts the doctrines of specific religion such as the teaching of evolution in the schools. Nor can they explain the complexity of the question of whether government can provide aid to private religious schools or permit religion in the schools on a formally equal basis. Such aid or permission advances religious liberty and treats religions equally. But it forces taxpayers to support religions to which they are conscientiously opposed; in many regions it will support a dominant religion; and it ignores that the provision of aid creates a dependency of church on the state that can dull its moral witness and weaken or modify its religious commitments.

The reasons for the attempt to simplify religion clause analysis are undoubtedly complex. Of course, a part of the simplification project is result-oriented. If one favors vouchers, for example, it makes things more difficult if the values of the clauses range beyond equal liberty or if the conceptions of liberty or equality are problematized. But the drive to simplify the analysis often goes beyond the likely consequences. There is an aesthetic appeal to analysis[451] that proceeds as if it were a form of legal geometry.[452] Moreover, there is a psychological appeal to security in having firm foundations.[453] And there is an appeal to the rule of law in avoiding the kind of messiness and discretion that follows when values come into conflict. There is a sense of rationality, objectivity, and integrity accompanying a method that minimizes subjectivity.[454] And there is the appeal to fairness that pulls toward an ideal of formal equality.

In the end, however, the simplification project can not be endorsed. It asks too much of theory in a context in which theory can have little resolving power. The pluralistic values underlying the religion clauses conflict with multiple governmental interests in a culture with a strong, diverse, and conflicting religious presence. The complications of these interactions are enormous. Theory can help to reveal

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451 *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 113 (2001) (criticizing the aesthetic fallacy).

452 *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 105 (rev. ed. 1999) ("We should strive for a kind of moral geometry with all the rigor that this name connotes."). Of course, the drive toward proofs satisfying the ideals of geometry is not just aesthetic), *see* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 16–20 (1983), but the aesthetic aspect is not trivial. *See* SHIFFRIN, *supra* note 31, at 121.

453 As Noonan writes, "[t]here is a praiseworthy desire to maintain intellectual consistency. There is a longing in the human mind for repose, for fixed points of reference, for absolute certainty. There is alarm about the future . . . ." Noonan, *supra* note 36, at 300.

454 *See* SHIFFRIN, *supra* note 31, at 120–28 (discussing the appeal of the Kantian approach).

the factors that should be relied upon to resolve problems in concrete contexts, and theory can help explain why particular problems are difficult. But the power of theory to dictate results in concrete contexts often runs out. Then we must rely on prudential judgment to make decisions and on practical experience to revise those decisions when they fail to work on the ground.[455] It makes for a messier world, but it is the world in which we live.

455 *Cf.* ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 288 (1975).